

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

REPORT

May 31, 2000



SUBMITTED TO THE
MINISTER OF JUSTICE OF CANADA

PREFACE

This is the first report of the Judicial Compensation and Benefits Commission established by 1998 amendments to the *Judges Act* to inquire into the adequacy of salaries and benefits of the federally-appointed judiciary. This new quadrennial process in part results from the Supreme Court of Canada's 1997 decision in *Reference Re Remuneration of Judges* calling for independent compensation commissions. The creation of this Commission also reflects recognition of the need to improve upon the previous process to determine judicial salary and benefits, which several triennial commissions had concluded was substantially inadequate. We undertook our responsibilities knowing that all parties were looking to this new process to produce results.

Our report is forward-looking. Past circumstances informed our deliberations; however, they were not determinative of our recommendations. The conclusions and recommendations in this report are the result of the Commissioners considering many relevant issues, weighing sometimes competing interests and making those choices that we believe are appropriate today and for the remainder of our mandate.

We believe that our recommendations, if fully implemented on a timely basis, will assist in ensuring the continued independence of the Judiciary and the ability to attract outstanding candidates for appointment to the Bench.

Acknowledgements

The Commission wishes to thank Guy Goulard, Commissioner for Federal Judicial Affairs, and the members of his organization, in particular, Marie Burgher, Jacqueline Desjardins, Wayne Osborne, Dave Poulin and Richard Saunders, for their support throughout the last nine months as we conducted our inquiry. As the Commission is now established on a permanent basis, the Office of the Commissioner for Federal Judicial Affairs has facilitated the establishment of offices and assisted in administrative matters since its inception. We would also like to thank the Information Technology staff at the Office of the Commissioner for Federal Judicial Affairs for their technical assistance in maintaining our computer links. Our thanks also to Daniel Poulin and others of LexUM in Montreal for the development and maintenance of our web site.

We also express our appreciation to the Office of the Chief Actuary, in particular Lou Cornelis, and to Raymond Gaudet and André Sauvé, of Morneau Sobeco, for their valuable assistance in actuarial, compensation and costing matters. The Commission also benefited from the constitutional expertise of Professor Patrick Monahan, of Osgoode Hall Law School, who was of great assistance in assessing the implications of the *Charter of Rights and Freedoms* on some of the issues raised during deliberations.

The Commission is most fortunate to have had as its Executive Director, Deborah Lapierre who was seconded to the Commission by Natural Resources Canada. Her previous experience with other boards and inquiries, together with her dedicated commitment to the organization and coordination of the Commission's research and proceedings made it possible to deliver this report within the legislated time limit. Ms Lapierre was ably assisted by Paula Carty, a Masters Degree graduate from Carleton University whose research, word processing and editing skills were relied upon in compiling our report. We are grateful to them both.

Richard Drouin, O.C., Q.C., Chair

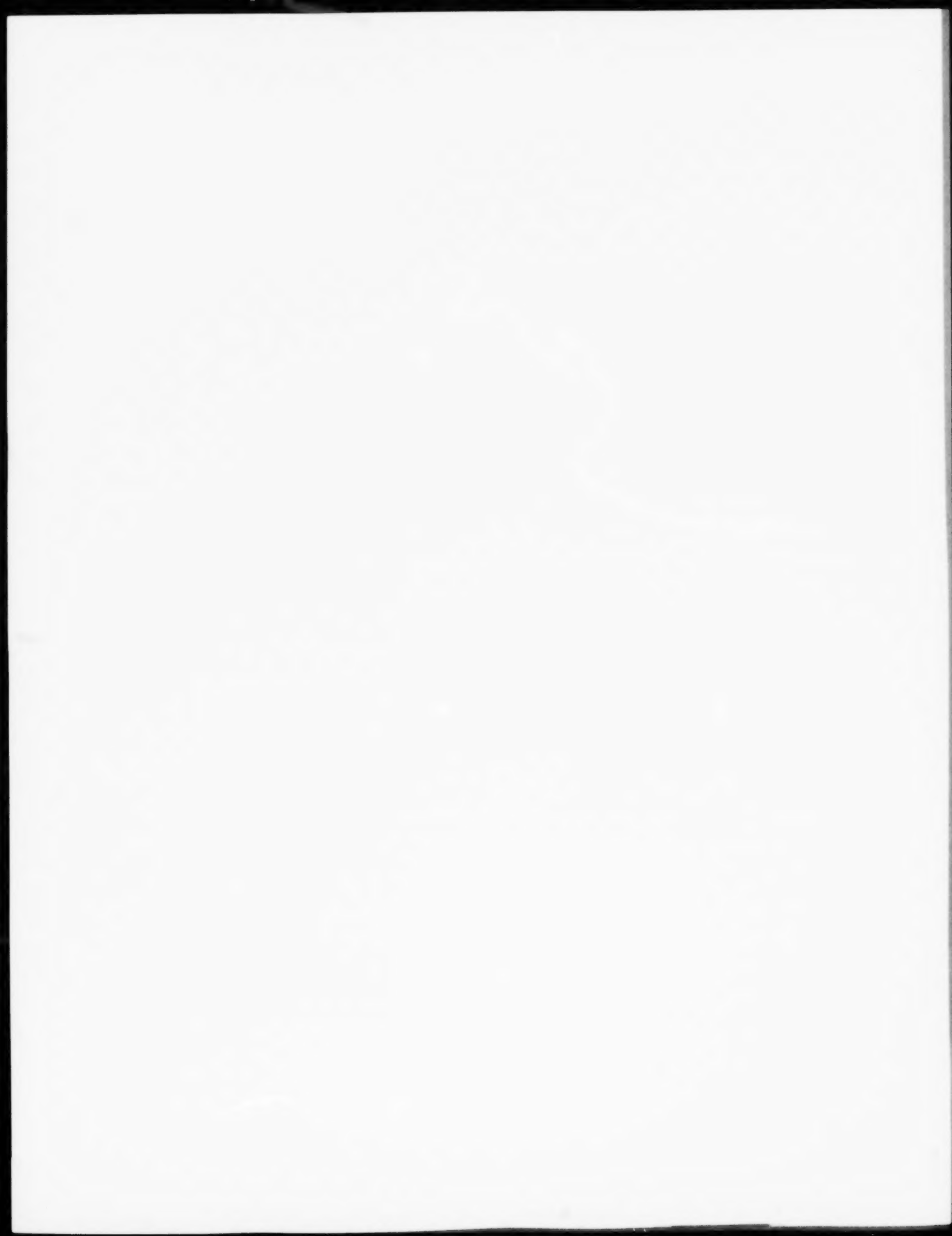
Eleanore Cronk, Commissioner

Fred Gorbet, Commissioner

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CHAPTER 1

INTRODUCTION

1.1 The Commission

The Judicial Compensation and Benefits Commission (the "Commission") consists of three members: one nominated by federally-appointed judges (the "Judiciary") and another by the federal Minister of Justice, and a Chairperson chosen by the first two nominees. In September 1999, the Minister of Justice announced the appointments by the Governor in Council of Richard Drouin, O.C., Q.C., as Chair of the Commission, and Eleanore Cronk and Fred Gorbet as Commissioners, for terms ending on August 31, 2003. The next quadrennial inquiry will not commence until September 2003. Accordingly, the planning horizon of this report is four years, ending August 31, 2003. The process contemplates that the Commissioners, once appointed, will function independently of the parties that nominated them. We have conducted ourselves accordingly.

1.2 Background and Context

The legal authority of the Parliament of Canada to set the compensation of the Judiciary flows from Canada's Constitution. Section 100 of the *Constitution Act, 1867* specifically provides that the salaries, allowances and pensions of the judges "*of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the time being paid by Salary*", are to be fixed and provided by the Parliament of Canada. This section of the *Constitution Act, 1867* has remained unchanged through various phases of constitutional reform. The process to facilitate the fixing of such compensation is now provided for in the *Judges Act*, R.S. 1985, c. J-1, as amended, (the "*Judges Act*").

Before 1981, judges' salaries and benefits were reviewed by advisory committees, a process which was generally unsatisfactory to the Judiciary. Judges felt that the process merely amounted to petitioning the government to fulfill its constitutional obligations.

In 1982, section 26 was introduced to the *Judges Act*, establishing the "Triennial Commission". The intention was to create a body which would be independent of the Judiciary and Parliament, and which would present the Minister of Justice with objective and fair recommendations. The goal was to depoliticize the process, thus maintaining judicial independence.

There were five Triennial Commissions¹. Despite extensive inquiries and research by each of them, many of their recommendations on judicial salaries and benefits, between 1987 and 1993, generally were unimplemented or ignored. The Government of Canada (the "Government") froze judges' salaries and suspended indexation in the mid-1990s. The last adjustment to judges' salaries was made in November 1998 pursuant to recommendations made by the Triennial Commission chaired by David Scott, Q.C. (the "Scott Commission")².

In its 1996 report, the Scott Commission described the problem with the triennial commission process by stating:

In spite of the thorough recommendation by successive Commissions, Parliament has failed, in a proactive sense, to fix judicial salaries and benefits for many years.

*Furthermore, successive reports have failed to generate any meaningful response from Government. The whole subject of judicial salaries and benefits has, in spite of best intentions, been politicized.*³

The Scott Commission's report and recommendations were tabled with the Minister of Justice in September 1996 and were then referred to the Standing Committee on Justice and Legal Affairs.

¹ Lang (1983), Guthrie (1987), Courtois (1990), Crawford (1993) and Scott (1996). Dates refer to the year of the Report.

² In November 1998, the *Judges Act* was amended to increase judicial salaries by 4.1% effective April 1, 1997 and an additional 4.1% effective April 1, 1998.

³ Scott (1996), at 8

While the Committee was considering that report, the Supreme Court of Canada ruled in *Reference Re Remuneration of Judges* (the "*PEI Reference Case*").⁴

The PEI Reference Case

The *PEI Reference Case* involved litigation concerning judicial independence and the remuneration of provincial court judges in a series of cases in Prince Edward Island, Alberta and Manitoba. The common issue in these cases was the validity of provincial legislation purporting to reduce the compensation of provincial court judges as part of wider restraint measures involving a large number of other persons whose compensation was paid from public funds. Although the case arose in the context of provincial court judges, it is clear that the Court's statements pertain equally to federally-appointed judges and, hence, to the Judiciary whose compensation is the subject-matter of this report.

In its decision, the Supreme Court of Canada outlined a number of basic principles concerning the obligations of governments in establishing judicial compensation. Chief Justice Lamer concluded for the majority of the Court that provinces are under a fundamental constitutional obligation to establish judicial compensation commissions and, further, in the absence of prior recourse to such commissions, any change to or freeze in the remuneration of provincial court judges is unlawful.

The Foundational Principle of Judicial Independence

The analysis of Chief Justice Lamer began with an extensive discussion of the basis for judicial independence. He concluded that judicial independence, at root, is an unwritten constitutional principle, which traces its origins to the *Act of Settlement of 1701*. It is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. Thus, the express provisions of the *Constitution Act, 1867* are not an exhaustive code for the protection of judicial independence in Canada. Rather, the specific provisions of the *Constitution Acts, 1867 to 1982*,

⁴ *Reference Re Remuneration of Judges* (1997), 150 D.L.R. (4th) 577 and [1998] 1 S.C.R. 3.

merely “*elaborate that principle in the institutional apparatus which they create or contemplate*” (at 617, para. 83).

The *PEI Reference Case* confirms that there are three core characteristics of judicial independence: security of tenure, financial security and administrative independence.

“Financial security” has both an individual and an institutional or collective dimension (at 631-633, paras. 115 to 122). Collective or institutional financial security has three components, all of which flow from the requirement that, to the extent possible, the relationship between judges and the executive branch of government be depoliticized (at 637, para. 131).

The necessity to depoliticize the relationship between judges and the executive branch of government requires, at least, that:

- i) no changes to or freezes in judicial remuneration be effected without prior recourse to an independent, effective and objective process for determining judicial remuneration. Thus, “*what judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration*” (at 637, para. 133);
- ii) under no circumstances should the judiciary, either collectively through representative organizations or individually, engage in negotiations concerning remuneration with the executive or representatives of the legislature. To do so would be to act fundamentally at odds with judicial independence (at 638, para. 134); and
- iii) judicial salaries cannot be reduced, in any circumstances, below a minimum level. According to the Court, “*...any reduction to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge*” (at 638, para. 135).

Only in extraordinary and dire circumstances may governments avoid the requirement of prior recourse to a compensation commission before changing or freezing judges’ remuneration. But for these rare and exceptional circumstances, as a matter of law, governments must adhere to the three components of the collective or institutional dimension of financial security identified above. Financial security, in turn, constitutes one of the three basic elements of judicial independence.

The Requirement for a Special Process

The *PEI Reference Case* did not dictate the exact shape and powers of the independent review body mandated by the Court's judgment. It did establish, however, certain of the required content of the norms of "independence, effectiveness and objectivity". Generally, such content includes at least the following:

- i) members of compensation commissions must have some kind of security of tenure, which may vary in length;
- ii) the appointments to compensation commissions must not be entirely controlled by any one branch of government;
- iii) a commission's recommendations concerning judges' compensation must be made "*by reference to objective criteria, not political expediencies*";
- iv) it is preferable that the enabling legislation or regulations creating compensation commissions stipulate a non-exhaustive list of relevant factors to guide the commission's deliberations;
- v) the process of compensation commissions must be employed before implementation of any changes or freezes to judicial compensation;
- vi) to guard against the possibilities that government inaction might lead to a reduction in judges' real salaries because of inflation, compensation commissions must convene at least every three to five years to ensure the adequacy of judges' salaries and benefits over time;
- vii) the reports of compensation commissions must have a "*meaningful effect on the determination of judicial salaries*". Thus, while the report of a compensation commission need not be binding, at a minimum the responsible legislative or executive authority must formally respond to the report within a specified time; and
- viii) finally, the executive or the legislature, as applicable, must be prepared to justify any decision rejecting one or more of the recommendations in a compensation commission's report, if necessary, in a court of law.

As envisaged by the *PEI Reference Case*, all provinces, as well as Yukon Territory, have established commissions to conduct reviews of the compensation and benefits of provincial and territorial court judges.

In 1998, Parliament enacted extensive amendments to the *Judges Act*. Certain of these amendments were intended specifically to respond to the requirement to assure an "independent, effective and objective" process for the determination of judicial compensation. The mandate of this Commission flows from the new process for review of judges' compensation established by the *Judges Act*, as amended.

1.3 Mandate

Section 26 of the *Judges Act* establishes the Commission. The Commission is permanent, with established offices and an independent structure. Its mandate is clearly set out in subsections 26(1) and (2) of the *Judges Act*:

26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.

Factors to be considered

(1.1) In conducting its inquiry, the Commission shall consider

- (a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;*
- (b) the role of financial security of the judiciary in ensuring judicial independence;*
- (c) the need to attract outstanding candidates to the judiciary; and*
- (d) any other objective criteria that the Commission considers relevant.*

26(2) The Commission shall commence an inquiry on September 1, 1999 and on September 1 of every fourth year after 1999, and shall submit a report containing its recommendations to the Minister of Justice of Canada within nine months after the date of commencement.

Also included in the Commission's mandate under the *Act* is a new referral clause whereby the Minister of Justice can request other reports from the Commission:

26(4) In addition to its quadrennial inquiry, the Minister of Justice may at any time refer to the Commission for its inquiry a matter mentioned in subsection (1). The Commission shall submit to that Minister a report containing its recommendations within a period fixed by the Minister after consultation with the Commission.

Subsections 26(6) and 26(7) of the *Act* outline the responsibilities of the Minister of Justice upon receiving a report from the Commission:

26(6) The Minister of Justice shall table a copy of the report in each House of Parliament on any of the first ten days on which that House is sitting after the Minister receives the report.

26(7) The Minister of Justice shall respond to a report of the Commission within six months after receiving it.

1.4 Operating Principles

In our deliberations, we were guided by our mandate as set out in section 26 of the *Judges Act*, described above. In particular, the *Act* requires that we determine whether judicial salaries and benefits are adequate and that we must consider, in arriving at this determination, the four factors set out in subsection 26(1.1).

In conducting our inquiry, we addressed each of these factors in a number of ways. We considered information presented to us in submissions from interested parties and in responses by those parties to our questions of clarification. Our staff undertook research on our behalf. We sought and received expert advice on some important issues. We also spent considerable time discussing among ourselves the issues, the evidence, how it could be interpreted, and our conclusions and recommendations.

It is important in the public interest and for the benefit of all interested persons, including the Judiciary and Government, that our report clearly outline the basis and rationale for our recommendations. For this reason, the specific context for our individual recommendations is discussed in more detail in subsequent chapters of this report. We believe it will also help the reader understand our overall report if we set out some of our basic conclusions and operating

principles to provide insight into how we approached the various issues we were asked to consider, in light of the statutory factors.

Our work was shaped and guided by the Supreme Court of Canada's articulation, in the *PEI Reference Case*, of the constitutional importance of the concept of judicial independence. From the outset we attempted to be alert and responsive to the requirements outlined by the Court for an "independent, effective and objective" special process for determining judicial compensation.

We strongly affirm the importance of an independent judiciary, and we recognize the role that financial security plays as a fundamental component of independence as set out in the second enumerated factor under subsection 26(1.1). We note, in this regard, that the *PEI Reference Case* does not provide explicit guidance as to the appropriate level of remuneration necessary to ensure judicial independence, other than to indicate that:

- i) the basic minimum must be at a level that will not lead to perceptions that judges are susceptible to political pressure through economic manipulation (at 658, para. 193); and
- ii) the salary level "*shall be adequate, commensurate with the status, dignity and responsibility of their office*" (at 659, para. 194).

We cite these references to illustrate an important point. There is, in our view, no single, objectively demonstrable answer to the question of what is adequate compensation for the Judiciary in light of the factors enumerated in subsection 26(1.1). This is not to say that the issues cannot be approached with objectivity. We believe that they can and we believe that we have done so. But, at the end of the day, judgments are required that necessitate compromise among sometimes competing objectives or interests.

For example, we were required explicitly by the first factor set out in subsection 26(1.1) to consider the economic situation and the financial position of the Government. We received material from the Government indicating that the economy is robust and the financial position is healthy. We concluded from this that there is no fiscal constraint that should impact on the ability of Parliament to ensure that judicial compensation is adequate. But the lack of fiscal constraint, while important and welcome, should not be viewed as an invitation to be profligate

with taxpayers' money. It is a condition that allowed us to recommend without constraint what we felt to be appropriate, but it did not help us determine what that recommendation should be.

Similarly, in interpreting the third factor identified in subsection 26(1.1), relating to recruitment of outstanding candidates to the Judiciary, it is important to note that there is no objective definition of "outstanding". An example of the need to compromise can be illustrated by considering this factor against the background of regional differences across Canada. Generally, all members of the Judiciary are paid the same salary, regardless of where they live and work. But it is a reality that attracting outstanding candidates in major metropolitan areas will require higher compensation than attracting outstanding candidates in rural areas of Canada. The Commission, therefore, considered whether judges should be differentially compensated, on a provincial or regional basis, as had been considered by various Triennial Commissions⁵. For reasons later outlined in this report, we concluded that we should not recommend regional variations in salaries. Nonetheless, we recognized that unless the Government compensates judges in all regions of the country according to the "highest paying" or most lucrative legal services market, which we do not believe to be realistic or responsible, uniform salaries will have a differential impact, in different regions of the country, on the ability to attract outstanding candidates to the Judiciary. After weighing what evidence was available and taking these realities into account, we had to make compromises that, in our view, best serve the broad public interest.

We sought, in accordance with the fourth factor enumerated in subsection 26(1.1), to inform ourselves with regard to a number of objective criteria that we believed relevant to our deliberations. These included, with regard to salaries, comparators that we considered in coming to conclusions about adequacy, particularly in light of the second and third enumerated factors. While we considered a number of comparators, we believe that the unique position of the Judiciary in Canada strongly militates against a formulaic approach to the determination of an

⁵ The Lang Commission (1983) considered recommending regional variations in judicial salaries and rejected the concept, "so as to avoid the creation of different classes within the judiciary" (at 7). The Lang Commission, however, did recommend that "the next triennial commission address the issue of regional and cost of living variations for judicial salaries and allowances" (at 15). The successor Commission, Guthrie (1987), concluded that "Having considered the matter, we are not disposed to recommend any changes" (at 10).

adequate salary. With regard to annuities and other benefits, we also sought the advice of experts on practices that are generally followed within the private and public sectors. Once again, we stress that while such information was helpful and informative, it was not determinative.

Finally, we conclude this section by noting that not only are the role and responsibilities of the Judiciary unique in our society, they constantly evolve according to the dynamics and needs of Canadian society. In response to the *Charter of Rights and Freedoms* (the "Charter"), and the growing complexity of our social and economic relationships, the Judiciary is playing an increasingly public role in key decisions that affect us all. Moreover, the characteristics of the Judiciary have changed and continue to shift: judges are being appointed at a younger age, and more females are being appointed to the Bench. The caseload of judges has grown, as more cases move to the higher courts for determination. Many of these cases are high profile and controversial. They capture the public interest and become the focus of media attention. Judicial decisions often generate considerable political debate. The reality of these trends must be recognized when considering the salary and benefits that are adequate to secure judicial independence and attract outstanding candidates to the Bench.

1.5 Operating Process

The Commission sought to establish an open and accessible process for all those interested in participating in our inquiry, or in keeping abreast of the Commission's proceedings. A web site was created and any documents that were accessible electronically were posted on the site (see <http://www.quadcom.gc.ca>). Links were made to other relevant sites and documents. An e-mail address was incorporated to allow for communication directly with the Commission and with the Commission's Executive Director in our Ottawa office.

In November 1999, a notice announcing the Commission's inquiry and process was published in major newspapers across the country. This notice invited anyone who was interested to make written submissions to the Commission and indicated that an oral hearing would be held. A copy of the notice is attached at Appendix 1. In addition, the Chair wrote letters to provincial and

territorial Ministers of Justice and Attorneys General and to law societies informing them of the Commission's inquiry and inviting submissions or comments on issues covered by our mandate.

The Commission received submissions from 20 parties. Submissions from the Canadian Judges Conference and the Canadian Judicial Council (the "Conference and Council"), representing the Judiciary, and from the Government covered a broad range of compensation and benefits matters. Submissions from other parties addressed a more limited range of specific issues. A list of those persons who provided written submissions is set out at Appendix 2.

The Commission held a public hearing on February 14, 2000 in the Government of Canada Conference Centre on Rideau Street in Ottawa. The hearing was continued on March 20, 2000 in the same location. A copy of the notices of hearing and a list of participants can be found at Appendix 3. Copies of the transcripts of these hearings are available for perusal at the Office of the Commission. Access can be arranged through the Executive Director.

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CHAPTER 2

JUDICIAL SALARIES

The determination of compensation for judges is grounded in the constitutional imperative that the independence of the judiciary be fostered and maintained. This necessarily means that the evaluation of judicial salaries, and benefits, must begin with recognition of the special role in Canada occupied by judges and the unique responsibilities they bear. As described in the submission of the Government, the role and responsibilities of judges are "*sui generis*", that is, in a category or class of their own.¹ For our purposes, their role and responsibilities require that they be paid a salary and be provided with benefits that are adequate to ensure them a reasonable standard of living, both prior to and after retirement, in relation to their position and duties in our society, in order that they might continue to function impartially and fearlessly in the advancement of the administration of justice.

We detail in this Chapter those considerations underlying our approach to evaluation of the adequacy of current judicial salaries, our assessment of the issues raised before us and those other matters which we regarded as relevant and useful.

2.1 The Legal Framework

The constitutionally-mandated requirement of judicial independence has resulted in special provisions under our law relating to judges. Some of these provisions deny to judges, basic rights and opportunities available generally to most other Canadians. Other provisions establish special entitlements for judges. Some of the indicators of the unique responsibilities and role of judges are embodied in the Constitution itself, and in our constitutional jurisprudence. Others

¹ Submission of the Government dated December 20, 1999, at para. 31.

flow from general statutory provision as, for example, under the *Judges Act*. In combination, they define the legal parameters within which compensation policy for judges is to be determined.

Constitutional Principles

The primary constitutional indicator of the importance of judicial independence is found in section 100 of the *Constitution Act, 1867*. By this provision, Canadian judges are the only persons in Canadian society whose compensation, by constitutional requirement, is to be set by Parliament. As discussed in section 1.2 of Chapter 1, constitutional jurisprudence, established most recently by the *PEI Reference Case*, requires that this be done following a process of review by independent compensation commissions.

Constitutional principles also protect judicial salaries from falling below an acceptable minimum level. As stated by Chief Justice Lamer:

...Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.²

In *The Queen v. Beauregard*,³ Chief Justice Dixon quoted with approval the following provision of the Universal Declaration of the Independence of Justice (1983), which affirmed that the salaries of judges:

...[must be adequate] commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.⁴

However, as noted by the Department of Justice in its submissions to the Crawford Commission in 1993:

² *Supra*, Chapter 1, fn. 4, at para. 135, and Submission of the Government dated December 20, 1999, at para. 24.

³ [1986] 2 S.C.R. 56.

⁴ *Ibid.*, at para. 33.

*There is no certain way of determining what amount of salary is necessary to provide the degree of financial security required for judicial independence. The amount of salary has always been, and will always be, a judgment call, and the unique responsibility for making that judgment call is placed, by our constitution, on Parliament. ...*⁵

Also relevant is the constitutional prohibition against judges negotiating any part of their compensation arrangements, including salaries, with the executive or representatives of the legislature. This prohibition on negotiation is exceptional. No similar restraint applies to any other class of persons in Canada. Except for the process of compensation commissions, it requires that judges refrain from negotiating or lobbying for improvements in their compensation arrangements. Under our traditions and laws, judges do not publicly advocate on such matters. As noted by Chief Justice Lamer in the *PEI Reference Case*:

*I recognize that the constitutional prohibition against salary negotiations places the judiciary at an inherent disadvantage compared to other persons paid from the public purse, because they cannot lobby the executive and the legislature with respect to their level of remuneration. The point is put very well by Douglas A. Schmeiser and W. Howard McConnell in *The Independence of Provincial Court Judges: A Public Trust* (Toronto: Canadian Association of Provincial Judges, 1996), at p. 13:*

Because of the constitutional convention that judges should not speak out on political matters, judges are at a disadvantage vis-à-vis other groups when making a case to governments for increments in salaries.

*I have no doubt that this is the case, although to some extent, the inability of judges to engage in negotiations is offset [by the constitutional guarantees requiring an independent compensation commission process]. In particular, the mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table...*⁶

⁵ 1975 *Equivalence – An Explanation*, Department of Justice, October 1992, at 7, contained at Appendix 3 to the February 14, 2000 Submission of the Conference and Council.

⁶ *Supra*, fn. 2, at para. 189.

While the *PEI Reference Case* makes it clear that this prohibition on negotiation does not preclude expressions of concern or representations by Chief Justices and Chief Judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration, nonetheless, the prohibition means that judges do not enjoy a basic right of other Canadians – the right to openly assert the need, and engage in negotiations, for improvements in compensation.

In part to offset the prohibition on negotiation, and the politicization that would otherwise result with respect to judicial compensation, the Judiciary enjoys the benefit of mandatory annual indexation of their salaries, as a matter of law. This entitlement, established by section 25 of the *Judges Act*, is also unique. Since 1981, automatic indexation according to the Industrial Aggregate Index (then known as the Industrial Composite Index) effective each April 1st, has been provided for by statute.⁷

Statutory Provisions

The special position of judges in our society is also reflected in a number of statutory provisions. For example, under our laws:

- i) judges are precluded from engaging in any other occupation or business other than their judicial duties;⁸ and
- ii) entry to the class of persons comprising the Judiciary is confined to lawyers of at least ten years standing at the bar of any province in Canada. This constitutes an entry level eligibility requirement particular to judges.⁹

⁷ The Industrial Aggregate Index (the "IAI") is a measure of wages. It is intended to, and in many years does, encompass more than changes in the cost of living as reflected in the consumer price index (the "CPI"). Over the period 1992-1998, the cumulative increase in the IAI was 14.51%, compared to a cumulative increase in the CPI of 10.2%. The IAI, however, does not always exceed the CPI in every year. For example, the increase in the IAI used to index judges' salaries as of April 1, 2000 was only 0.67%, compared to an increase of 1.7% in the CPI over the same period. This was the lowest level for the IAI experienced since 1981.

⁸ Section 55 of the *Judges Act* (Canada).

⁹ Section 3 of the *Judges Act* (Canada). This provision, of course, is designed to ensure that candidates for appointment to the Bench have achieved the requisite level of experience, judgment and skill, as well as seniority and profile within the legal profession, as to warrant consideration of their candidacy for appointment. In essence, it represents a statutory form of competency threshold.

Other Considerations

All of the constitutional and statutory factors described above contribute to the overall legal framework within which any analysis of the adequacy of judicial salaries must be undertaken. We were mindful of these factors, and this framework, in approaching our task.

Other considerations are also relevant, however, to the assessment of judicial salaries. Foremost among these, arguably, is the fact that the nature of the job required and expected of Canadian judges has undergone significant change over the years. There are increasing, and ever-shifting, demands placed upon the Judiciary. As a result of the introduction of the *Charter*, the growth in litigation in Canada, the complexity of the matters which actually proceed before the courts, and intensified public scrutiny of judicial decisions, the process and requirements of "judging" have become more onerous at both the trial and appellate levels. There is no reason to conclude that this will change during the planning period relevant to our report.

We also recognized the constraints facing judges should they become dissatisfied with working conditions or compensation arrangements. In practical terms, should the morale of members of the Judiciary deteriorate because of such matters following appointment to the Bench, there is no ready forum or remedy, short of resignation by individual judges or litigation, by which the Judiciary may seek to achieve a negotiated resolution of complaints or dissatisfaction. Once again, under our constitutional system, the Judiciary does not speak publicly on such issues. They are limited to seeking redress once every four years, in the process of a compensation commission review. This constitutes a further limitation on the options of judges, in contrast to those available to other Canadians.

Moreover, many concepts and mechanisms that are basic and useful in the setting of compensation policy in the private and public sectors traditionally have not applied, and in some cases cannot apply, to the Judiciary. While this emanates from sound public policy and, in some instances, in consequence of constitutional requirements, it does mean that the potential for utilizing flexible or creative approaches to compensation policy for the Judiciary is constrained. For example:

- i) in the private corporate sector, it is common to set compensation policy, including salary levels, for senior managers and executives taking into account and integrating where appropriate some combination of bonus plan arrangements, profit-sharing, gain-sharing, merit awards, long-term cash incentives, stock purchase plans and stock options. Some of these mechanisms can and do apply to lawyers engaged in the practice of law with law firms or corporations. They have no application, however, to the Judiciary;
- ii) similarly, resort cannot easily be had to compensation techniques sometimes utilized in the public service. While performance pay, bonus arrangements, "at-risk" or variable pay and recruitment or signing bonuses all potentially play a role in the determination of compensation for senior managers or Order-In-Council appointees within the Government, such concepts are not easily imported into the design of a judicial compensation scheme. In any event, the application of some of these mechanisms to the Judiciary, in our view, would not be in the public interest; and
- iii) concepts of promotion and merit pay have no application in the judicial context.

These factors make the evaluation of judicial salaries complex, and the prospects for innovation remote. The Commission believes it is important, therefore, to recognize that both practical constraints and legal requirements define the boundaries for setting judicial compensation policies.

We have also taken into account three other material considerations.

First, as subsequently discussed in this report, the annuity arrangements in place at present for the Judiciary are unique in Canada in many respects. This is so for many important policy and constitutional reasons. As observed by several Triennial Commissions, the value of a judicial annuity constitutes a significant portion of the total compensation available to judges. In our view, the assessment of the adequacy of judicial salaries cannot be undertaken prudently, or fairly, without examination of the total compensation of judges, including pension benefits. Consideration of the value of the annuity benefit available to judges upon retirement is an important, although not determinative, factor in setting salary levels.

Second, in several submissions received by the Commission, it was emphasized for varying purposes that the demographics of the Judiciary have changed significantly such that they have

come to include, over time, the appointment of a greater number of young and female judges. The achievement of greater diversity in the demographic profile of the Bench, a laudable policy objective identified and supported by the Government, Bench and bar over the years, also carries with it compensation consequences. One of these consequences is increased life expectancies of some appointees in comparison to others, as well as greater anticipated tenure of younger appointees on the Bench until eligibility for retirement is achieved, in contrast to the anticipated tenure of colleagues appointed at comparatively older ages. These factors have implications both for the evaluation of judicial salaries and to issues concerning the current pension arrangements for the Judiciary.

Finally, in contrast to both the private and public sectors, retention factors traditionally have not played a material part in the setting of judicial salaries. Historically, few judges resigned their positions prior to eligibility for retirement, save for health or personal reasons. In these times, it would be unwise to assume that retention is not a relevant factor in judicial compensation.

2.2 The Positions of the Parties

At present, puisne judges (excluding puisne judges of the Supreme Court of Canada) are paid a salary of \$179,200 per annum, inclusive of indexation as of April 1, 2000, in accordance with section 25 of the *Judges Act*. Also effective April 1, 2000, Chief Justices and Associate Chief Justices of the Superior, Federal and Tax Courts receive a base salary of \$196,500, and Justices of the Supreme Court of Canada receive a base salary of \$213,300. The April 2000 adjusted salary for the Chief Justice of Canada is \$230,200.

On the issue of the current adequacy of these judicial salaries, the principal parties were starkly divided.

The Conference and Council urged that judicial salaries be increased to at least \$225,000 per year effective April 1, 2000 and, further, that provision be made to supplement that base salary with further staged increments, in addition to the mandatory annual statutory indexing, for the duration of the work of this Commission as currently constituted and as may be necessary to

reflect any parallel movement in the remuneration of senior Deputy Ministers within the Government.

The request for a \$225,000 salary level was premised in part on the proposition that such an increase was warranted to establish a necessary and reasonable relationship between judicial remuneration and that of senior lawyers at the bar from whose ranks judges are traditionally appointed. In addition, it was argued that recent increases in the salaries of senior Deputy Ministers in the Government supported such a salary level. The Conference and Council also pointed out that review of judicial compensation is now undertaken at four-year intervals rather than three year intervals as was the case prior to 1998. Thus, judicial salaries will not be reviewed again until at least the fall of 2003. In contrast, the compensation of senior Deputy Ministers and others within Government will next be reviewed in 2001. Moreover, based on past history, some delay may be anticipated in implementing those salary recommendations of this Commission that are accepted by Parliament. For all of these reasons, the Judiciary argued that it was now time for a "*real and substantive increase*" in the salaries of the Judiciary.

In contrast, the Government submitted that the current level of judicial salaries, coupled with automatic annual adjustments mandated by the statutory indexation provision, reflects an adequate and acceptable level of judicial remuneration. In the alternative, if the Commission concluded that an increase in judicial salaries was necessary based on compensation trends in the federal public service, the maximum increase that could be justified would be 5.7% as of April 1, 2000, inclusive of statutory indexing effective the same date.¹⁰

The Government submitted that the effect of section 25 of the *Judges Act* has been "*not merely to protect judicial salaries against inflation, but to deliver an increase in salary in real terms*".¹¹ In addition, it was submitted that the level of existing judicial salaries fully reflects the recommendations of the Scott Commission (1996), which expressed concern about the erosion of judicial salaries resulting from the freeze on the salaries of judges and other publicly - remunerated officials during the five-year period commencing December 1992 and ending

¹⁰ Submission of the Government dated December 20, 1999, at paras. 25 and 40.

¹¹ *Ibid.*, at para. 18.

March 31, 1997 pursuant to the *Public Sector Compensation Restraint Act* (Canada).¹² As a result of that statute, annual statutory indexing of judicial salaries was suspended for a five-year period and no other alterations in the level of judicial salaries were made.

The Scott Commission recommended that commencing April 1, 1997, the Government introduce an “*appropriately phased upward adjustment in judicial salaries such as to ensure that the erosion of the salary base caused by the elimination of statutory indexing is effectively corrected*”.¹³ This recommendation was implemented over two years, with the result that judicial salaries were increased by 4.1% on April 1, 1997 and by an additional 4.1% on April 1, 1998. The Government asserted that these increases were in addition to the restoration of annual indexing adjustments and that they had the effect of restoring judicial salaries to the levels that would have been attained if indexing had not been suspended during the five years of the freeze.¹⁴

2.3 The Suggested Comparators

The Conference and Council suggested to the Commission that the adequacy of current judicial salaries should be examined with reference to various comparators, namely:

- i) the salaries at present of the most senior level of deputy ministers within the Government (“DM-3s”);
- ii) the incomes of the top one-third of lawyers in the private practice of law in Canada, to the extent measurable by available income tax data; and
- iii) the salaries available to judges, including senior judges, in other jurisdictions including England, Australia and New Zealand.

As later discussed, the Government expressed concerns regarding the applicability, and reliability, of such comparators.

¹² *Ibid.*, at para. 11.

¹³ Scott (1996), at 16.

¹⁴ *Supra*, fn. 10, at para. 12.

Because of the special legal and other considerations that establish the framework within which judicial salaries are to be assessed and determined, no suggested comparator to the Judiciary is truly apt. Nonetheless, each suggested comparator informs the overall assessment of the adequacy of judicial salaries. In this context, some comparators are more useful than others.

We concluded that all of the suggested comparators should be included in our considerations but, as earlier noted, a strictly formulaic approach to the determination of an adequate salary level for judges was not desirable or appropriate. Our conclusion in this regard was reinforced by our review of the reports of various Triennial Commissions, each of which considered one or all of the comparators suggested to us by the Conference and Council, and each of which placed greater or lesser weight on them depending upon their view of prevailing circumstances at the time of their respective inquiries. Thus, while one comparator might be apposite during the planning horizon of one compensation commission, another suggested comparator might be more relevant during the inquiry of another, depending upon all of the considerations then relevant. In our view, at this time, no one comparator can or should dominate.

Various Triennial Commissions discussed in their reports the concept of "relationships" between judicial salaries and the salaries of DM-3s or the compensation of senior members of the bar. In some instances, recommendations concerning judicial salaries were based on a suggested "gap" between the salary level of judges and the salary of one or more comparator groups. Thus, all of the Lang (1983), Guthrie (1987), Courtois (1990) and Crawford (1993) Commissions specifically considered the historic relationship between judicial salaries and the salaries of DM-3s, and the status of that relationship at the time of their respective inquiries. Similarly, those Commissions and the Scott Commission (1996) considered the incomes of legal practitioners to be a relevant and useful comparator and the relationship between judicial salaries and the incomes of private practitioners an important factor in formulating recommendations on judicial salaries. In the case of the Scott Commission (1996), as discussed further below, this comparator was regarded as the most significant one for the purposes of that Commission's salary recommendations.

In our view, the criteria now enumerated in subsection 26(1.1) of the *Judges Act* expressly permit consideration of such relationships. The criterion identified in subsection 26(1.1)(c), for example, is directed expressly to the issue of recruitment of suitable candidates for the Bench. Traditionally, most judges in Canada are appointed from the ranks of private legal practitioners. Accordingly, those factors constituting incentives or disincentives to the seeking of judicial office by private legal practitioners are relevant to recruitment of judicial candidates. Compensation differentials are clearly one of the factors influencing the decision by practitioners to seek appointment to the Bench. Similarly, none of the parties before this Commission took issue with the proposition that the compensation of DM-3s could be considered by this Commission, if thought by us to be relevant, under subsection 26(1.1)(d).

Part of our principal mandate under the *Judges Act* is to inquire into the adequacy of the salaries of the Judiciary. "Adequacy" is a relational term. In seeking to determine its meaning in the context of judicial salaries, several questions arise: Adequate for what purpose? Adequate in relation to who, or what? Adequate over what time frame? Against the background of the constitutional principles articulated in the *PEI Reference Case*, we have concluded that the operative meaning of "adequacy", to guide our work, requires us to determine what constitutes a fair and sufficient salary level for the Judiciary taking into account the criteria set out under subsection 26(1.1). What is required in this context is a proper judicial salary level, not a perfect one.

The DM-3 Comparator

The number of DM-3s fluctuates by reason of resignations and promotions.¹⁵ There were 10 Deputy Ministers within Government at the DM-3 level as of late November 1999. As of April 1, 2000 there were 13 incumbent DM-3s.

¹⁵ Responses to Requests Provided by the Government of Canada to the Judicial Compensation and Benefits Commission dated April 19, 2000, at para. 5.

As a result of a report in 1998 by the Strong Committee¹⁶ on Senior Level Retention and Compensation, significant enhancements to the salary levels of DM-3s, among others, were recommended and ultimately accepted by the Government. In summary, the Strong Committee recommended a base salary increase for DM-3s of 19.4% effective April 1, 1998, plus variable at-risk pay. As implemented to date, effective April 1, 1999, the mid-point base salary level for DM-3s was set at \$188,250, within an overall salary range of \$173,000 to \$203,500. Table 2.1 below, reproduced from materials provided to the Commission by the Government,¹⁷ illustrates the increases in the mid-point of the base salary of DM-3s since 1992.

Table 2.1
Mid-Point and Base Salary Ranges: DM-3s

Date	Mid-Point Salary	Base Salary Range
April 1, 1992	\$150,750	\$136,000 - \$165,500
June 1, 1992	\$155,300	\$140,100 - \$170,500 (3% legislated increase effective June 1, 1992)
April 1, 1993	\$155,300	\$140,100 - \$170,500
April 1, 1994	\$155,300	\$140,100 - \$170,500
April 1, 1995	\$155,300	\$140,100 - \$170,500
April 1, 1996	\$155,300	\$140,100 - \$170,500
April 1, 1997	\$155,300	\$140,100 - \$170,500
April 1, 1998	\$188,250	\$173,000 - \$203,500 (19% increase as a result of Advisory Committee recommendations)
April 1, 1999	\$188,250	\$173,000 - \$203,500

¹⁶ First Report of the Advisory Committee on Senior Level Retention and Compensation, dated January 1998 (the "Strong Committee").

¹⁷ Letter from the Department of Justice, Canada, dated December 9, 1999.

In addition to their base salary level, DM-3s have been entitled since July 1, 1996 to some form of performance, variable or at-risk pay. The Strong Committee recommended a new scheme of variable, at-risk compensation for DM-3s, to replace the previously existing performance pay scheme and to be paid on the basis of performance measured against agreed targets and the achievement of business plans. This variable pay component was regarded by the Strong Committee as an integral part of the total compensation for DM-3s. It is a pensionable component of compensation for these public servants in that it forms part of the compensation against which annual pension accrual entitlements are calculated. Fourteen persons received at-risk pay as DM-3s as of April 1, 1999.

The Strong Committee recommended that at-risk or variable pay for DM-3s up to a maximum of 10% of salary be introduced by April 1, 1999, and that a maximum of 20% of salary be introduced by April 1, 2001 (for performance in fiscal year 2000-2001). Table 2.2 below, illustrates the range of at-risk awards that were made as of April 1, 1999.¹⁸

Table 2.2
Distribution of 'at-risk' pay for DM-3s (14 eligible)
As of April 1, 1999

Percentage of 'at-risk' pay	Number of DM-3s
Between 0% and 5%	2 (average \$4,400)
Between 5.5% and 7%	4 (average \$13,200)
Between 7.5% and 10%	8 (average \$17,735)

Overall average 'at-risk' pay: \$15,800

Overall average 'at-risk' pay as % of average salary: 8.19%

¹⁸ Submission of the Government dated March 31, 2000, at Tab 48.

As appears from Table 2.2, the average at-risk pay effective April 1, 1999 ranged from \$4,400 (2 DM-3s) to \$17,735 (8 DM-3s). The overall average at-risk pay, as of the same date, was \$15,800 or 8.19% of average salary.

The Government argued that the DM-3 comparator was a weak one for the purposes of assessing the adequacy of current judicial salaries and, in any event, that it should not be determinative of our recommendations concerning judges' salaries. It was suggested that the overall increase in the compensation of DM-3s, as recommended by the Strong Committee and accepted by the Government, came about because DM-3s did not have the advantage of automatic annual indexing of their salaries, in contrast to the benefit afforded judges under section 25 of the *Judges Act*. Accordingly, if the DM-3 comparator was to be used by the Commission, it was the Government's position that regard should be had only to the mid-point of the base salary level of DM-3s, namely, to the sum of \$188,250, without any regard to at-risk awards. This would result in a 5.7% salary increase for puisne judges¹⁹, inclusive of annual statutory indexing as of April 1, 2000.

Several observations should be made:

- i) the Commission does not accept the Government's submission that no regard should be had to the at-risk component of the DM-3 compensation package in comparing judicial salaries with those of DM-3s. Similarly, the Commission does not agree with the implied submission of the Conference and Council, that the proper comparison point is the maximum at-risk award. It is not clear what proportion of at-risk pay is relevant in making the compensation comparison between judges and DM-3s but, in our view, it is not zero, and it is not 100%. We concluded that neither of these approaches is appropriate;
- ii) while the relevant proportion, for comparison purposes, of DM-3 at-risk pay cannot be precisely ascertained, one can consider the average of actual at-risk awards, as a percentage of the maximum. Based on the most current information available (that is, the at-risk awards made as of April 1, 1999), this average was 82%. If the 82% average payout effective as of April 1, 1999 is added to the mid-point of the DM-3 base salary range (\$188,250), it results in total compensation of \$203,686 (\$188,250 plus \$15,436);

¹⁹ That is, an increase of \$10,250 from a 1999 base of \$178,000.

- iii) based on the information provided to the Commission, it is not possible to ascertain the number of DM-3s who were at the high end of the total salary range as of April 1, 1999. In the interests of maintaining the privacy of the affected individuals, the Commission is unaware of what any individual DM-3 earns, either as base salary or for at-risk pay as of April 1, 1999. What is clear from the available information, however, is that the overall total range for DM-3 compensation as of April 1, 1999 was \$173,000 (the lowest end of the base salary range without any at-risk award) to a maximum of \$223,850 (the highest end of the base salary range, plus the maximum at-risk award of \$20,350);
- iv) at the time of finalizing our report, the at-risk awards for DM-3s effective as of April 1, 2000 had not yet been determined. The Strong Committee recommended variable pay for DM-3s up to a maximum potential of 10% of salary for fiscal years 1998-99 and 1999-2000, to reach 20% for fiscal year 2000-2001. The Government informed us that, *"consistent with the recommendations, the maximum available in respect of 1998-99 was 10% and is likely to be 10% for 1999-2000"*.²⁰

Assuming, therefore, a 10% maximum for at-risk awards in 1999-2000, the total range for DM-3 compensation as of April 1, 2000 would be identical to the range as of April 1, 1999, that is, \$173,000 to \$223,850; should the at-risk awards again average 82% of maximum, applying the average at-risk award to the mid-point of the base salary range would result in an overall compensation level of \$203,686 as of April 1, 2000;

- v) should the Government accept the Strong Committee recommendation to increase at-risk awards as of April 1, 2001 (for performance in fiscal year 2000-2001) to a maximum of 20% of salary, the total range for DM-3 compensation as of that date will be increased to \$173,000 (the lowest end of the base salary range without any at-risk award) to \$244,200 (the highest end of the base salary range, plus the maximum at-risk award of \$40,700). If actual at-risk awards are again in the range of 82% of maximum, application of this average to the mid-point of the base salary range would result in an overall compensation level of \$219,123 as of April 1, 2001 (\$188,250 plus 82% of 20% of salary);
- vi) if one were to assume that all DM-3s will receive the maximum 20% at-risk award as of April 1, 2001, the mid-point of the compensation range would be adjusted by 20% to yield a total salary of \$225,900 (\$188,250 plus \$37,650). The request of the Conference and Council before this Commission for a salary level of \$225,000 emanates from this calculation; and

²⁰ Submission of the Government dated January 21, 2000, at para. 16.

- vii) the Strong Committee is scheduled to again review compensation for senior executives within the Government, including DM-3s, in 2001. The Commission has taken into consideration the timing of that scheduled compensation review in comparison to the timing of the next required review of judicial compensation and benefits, in the fall of 2003.

Before the Triennial Commissions, much was said about the concept of "1975 equivalence", referring to the historic relationship of rough equivalence between the salaries of judges and those of senior deputy ministers in the federal public service. This concept of the relational aspects of judicial salaries to those of DM-3s, was a significant issue for each Triennial Commission, including the Scott Commission. Both the Guthrie and Scott Commissions (1986 and 1996, respectively) observed that as a result of amendments to the *Judges Act* in 1975, the salary level of Superior Court puisne judges was "brought to within 2% of the mid-point of the salary range" of DM-3s. They suggested, however, that thereafter the relationship again deteriorated. By 1989 the level of judges' salaries was said to be \$8,200 below 1975 equivalence.²¹

In submissions in 1993 by the Department of Justice to the Crawford Commission, the Department, argued that:

Despite the historically lower salaries of judges as compared with senior deputy ministers, the government has indicated to the judges that a rough equivalence between judicial salaries and the midpoint of the DM-3 salary scale would be considered appropriate. Support for this sort of rough parity between judges and top-level public servants is found in comparative figures from other common-law countries that are most like Canada. ...

*1975 was a long time ago, and much has changed in the meantime, not the least of which has been our economy. There seems to be little point in trying to tie judicial salaries to some arbitrary level set so long ago and in very different circumstances. Therefore, the government thinks it would be better to do away with both the concept and the terminology of 1975 equivalence, and instead deal with judicial salary levels on the basis that there should be a rough equivalence to the DM-3 midpoint.*²²

²¹ Lang (1983), at 6; Guthrie (1987), at 8; Courtois (1990), at 10 and see *Supra*, fn. 5, at 3.

²² *Ibid.*, fn. 5 at 6.

This concept of rough equivalence expressly recognizes that while DM-3s and judges do not perform the same work, there is a basis for approximate remuneration parity.²³

In this context, the Commission noted the suggestion by the Scott Commission (1996) that there were two contributing factors to erosion in judicial salaries, the first only of which was attributable to the withdrawal of statutory indexing and the second of which was occasioned by the suggested failure of governments to introduce 1975 equivalency.²⁴ We agree with the suggestion made by the Department of Justice in 1992 that the concept of 1975 equivalence may be less useful today than it once was to earlier compensation commissions. We were concerned, nonetheless, to track the historical relationship between the mid-point salary levels of DM-3s and judges. Table 2.3 below, reproduced from information provided by the Government, tracks the historical salary data of Superior Court Judges and DM-3s at mid-point of salary range, from 1980 to 2000.²⁵

Based on Table 2.3, it appears that by 1989 the salaries of Superior Court Judges were \$10,850 below the mid-point salary level of DM-3s. A disparity between the salary levels of such judges and DM-3s persisted until 1991 (in reducing amounts). In 1992 the situation was reversed and the judicial salary level became slightly more per annum than the base mid-point salary level of DM-3s. This remained the case for the next four years, while wage restraint measures were in effect. In 1997, as a result of partial implementation in that year of the salary recommendations of the Scott Commission (1996), the judicial salary level became \$10,200 higher than the mid-point base salary level of DM-3s. By 1998, when salary levels for DM-3s were adjusted as a result of the Strong Committee recommendations, the base salary level for DM-3s was increased to a mid-point amount of \$188,250, the level at which it remains today. After implementation in 1998 of the remaining aspects of the Scott Commission's salary recommendations for judges, a salary gap or differential was again created between the salary level of judges and that of DM-3s, in amounts ranging from \$12,450 (1998) to \$9,050 (2000).

²³ *Ibid.*, at 5.

²⁴ Scott (1996), at 15 to 16.

²⁵ *Supra*, fn.15, at Appendix 57.

Table 2.3
Historical Salary Data – 1980 to Present

Year	Superior Court Judges	DM-3 – Mid-Point
1980	\$70,000	\$77,300
1981 (Apr)	\$74,900	\$86,750
1981 (Nov)	\$74,900	\$91,750
1982	\$80,100	\$97,250
1983	\$84,900	\$102,105
1984	\$89,100	\$105,675
1985	\$105,000	\$110,950
1986	\$115,000	\$110,950
1987	\$121,300	\$126,500
1988	\$127,700	\$134,550
1989	\$133,800	\$144,650
1990	\$140,400	\$150,750
1991	\$147,800	\$150,750
1992	\$155,800	\$155,300
1993	\$155,800	\$155,300
1994	\$155,800	\$155,300
1995	\$155,800	\$155,300
1996	\$155,800	\$155,300
1997	\$165,500	\$155,300
1998	\$175,800	\$188,250
1999	\$178,100	\$188,250
2000	\$179,200	\$188,250

Note: The salaries in Table 2.3 are as of April 1 of the year in question. The only exception is for 1981; the first entry is for April 1; the second is for November 1, the date on which executive classifications and salaries were restructured.

To the extent then, that rough equivalency between judicial salaries and the remuneration of DM-3s was the desired outcome, the basic salary levels of these groups have been “out-of-sync” for the last four years. When it is recognized that variable, at-risk pay for DM-3s became substantial in 1998 as a result of the adoption of the recommendations of the Strong Committee, the pay gap between the two groups becomes more pronounced.

We have considered this matter in detail and have examined the various approaches taken by Triennial Commissions, the Judiciary and Government depending upon the timing and circumstances applicable to previous judicial compensation reviews. While we agree that the

DM-3 comparator should not be determinative of our recommendations concerning judicial salaries, in our view, it is an appropriate and useful comparator at this time. More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of "value" but as a reflection of "*what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges*".²⁶

This approach is consistent, in our view, with the conclusions reached by successive Triennial Commissions that judicial salaries are not to be addressed "*as though judges were subject to the conditions of service of federal government employees*"²⁷ because they are "*a distinct group with compensation requirements that set them apart from the public service*".²⁸ This proposition is not simply a matter of policy perspective. It has long been recognized in the relevant jurisprudence. As articulated by the House of Lords in 1933:

*It is we think beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive, and between the Executive and the subject. They have to discharge the gravest and most responsible duties. It has for two centuries been considered essential that their security and independence should be maintained inviolate.*²⁹

More recently, the Supreme Court of Canada in the *PEI Reference Case* unequivocally confirmed that judges are not to be regarded as civil servants for the purposes of compensation policy. As stated by Chief Justice Lamer:

²⁶ Scott (1996), at 13; Courtois (1990), at 10.

²⁷ Lang (1983), at 3.

²⁸ Guthrie (1987), at 7.

²⁹ *Ibid.*, at 7.

...the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence – security of tenure, financial security, and administrative independence – are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.³⁰

In this context, it is clear that the salaries of judges are not to be set automatically based on the remuneration of public servants. To do so would be to treat judges, indirectly, as part of the executive branch of government. That does not mean, however, that the salaries of judges must be set without any regard to remuneration levels within the senior ranks of the Government, or that they should be permitted to lag materially behind the remuneration available to senior individuals within the Government. To allow this to occur, would be to legitimize a financial gap between the overall remuneration of judges and the remuneration of those within the Government who, historically, have been regarded as possessing the same characteristics of skill, integrity, talent and leadership required of judges.

We have concluded, therefore, as did successive compensation commissions before us, that the remuneration of DM-3s at the time of our inquiry and for the term of our mandate is relevant to our assessment of the adequacy of judicial salaries and, further, that rough equivalency between the overall remuneration of DM-3s and the salary level of judges is both proper and desirable in the public interest.

Incomes of Private Practitioners

The appropriateness and utility of examining the relationship between judicial salaries and the incomes of lawyers in private practice, as earlier noted, was affirmed by various Triennial Commissions. Just as the concept of a relationship between remuneration levels of DM-3s and judges has been found worthy of support, so too has the concept of a relationship between the incomes of above-average lawyers and salaries of judges.

³⁰ *Supra*, fn. 2, at 640, para. 143.

The Lang Commission (1983) supported maintenance of a proportionate relationship between the salaries of Superior Court Judges and the professional incomes of senior members of the bar because it is the latter class of persons who, in the public interest, should be attracted to the Bench. It was the conclusion of that Commission that such a proportionate relationship should be maintained "... while at the same time recognizing that the satisfaction to be derived from public service is both an incentive to judicial office and an incalculable part of judicial compensation".³¹

Thirteen years later, the Scott Commission was more strongly of this view. It concluded that the relationship between judicial salaries and the incomes of lawyers in private practice was a "far more significant aspect" of judicial compensation than was the relationship between DM-3s and judges' compensation.³² The Scott Commission felt that the entitlement of judges to automatic statutory indexing of their salaries was reflective of much more than a statutory device designed merely to prevent erosion of salaries from inflation. Rather, it suggested, the provisions of section 25 of the *Judges Act*, are:

*... more specifically, a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. By its statutory terms, the judges, who by acceptance of judicial office close the door, on a permanent basis, to any real prospect of a return to their previous lives at the Bar, can at least be certain that their commitment in accepting a judicial appointment will not result over the years in a less favourable financial situation as between judicial service and practice at the Bar than that which prevailed at the moment of their appointment.*³³

The Conference and Council strongly urged the Commission, when assessing judicial salaries, to have regard to the available data concerning incomes of lawyers in private practice including those, in particular, within the top third of income earners based on reported income tax data.

³¹ Lang (1983), at 3.

³² Scott (1996), at 14.

³³ *Ibid.*, at 14 to 15.

The Government argued that various difficulties arise when such a comparison is undertaken. These difficulties concern both the availability of income data and issues relating to the appropriate comparator segment of the legal profession. In raising these concerns, however, the Government did not argue that any comparison with the incomes of members of the legal profession was inappropriate or irrelevant.³⁴

Other groups also supported consideration by us of the incomes of private practitioners. The Canadian Bar Association ("CBA"), through its Standing Committee on Pensions for Judges' Spouses and Salaries, provided the Commission with both written and oral submissions on the matter of judicial salaries. The CBA expressed concerns that:

...judicial salaries are falling farther and farther behind those of senior practitioners, who form the pool from which judges are selected. Except for indexation to reflect inflation, federally appointed judges have not received a salary increase for over a decade. Indexation does not take into account that salaries for senior practitioners, as determined by the market, probably increased more than the cost of living.

As a result, the CBA recommends that judges receive a salary increase over and above indexation. To determine the appropriate level of salary, reference should be made to salaries of senior practitioners as well as senior employees in the public service.³⁵

The CBA did not make any submission as to a specific salary level considered by its members to be appropriate or adequate.

While the information available to the Commission did not support, for reasons earlier outlined in this Chapter, the suggestion that the Judiciary has not received "a salary increase for over a decade", the available data did indicate that the incomes of senior practitioners in the legal profession are in some instances higher, sometimes materially higher, than the salary level of judges. However, as appears from the discussion below, much depends on regional location and urban versus non-urban factors.

³⁴ Submission of the Government dated December 20, 1999, at paras. 27 and 28.

³⁵ Submission of the Canadian Bar Association dated January 14, 2000, at 4 to 5.

The Commission also had regard to a submission received from John Honsberger, Q.C., an experienced practitioner from Toronto. Mr. Honsberger urged that:

*The salaries of judges should be increased by at least the increased cost of living and any additional amount as may be necessary to catch up to an appropriate salary level so that judges may maintain a standard of living comparable to what most members of the profession enjoy but with some reduction to represent the value of the pension a judge will receive on retirement.*³⁶

It is the view of this Commission that the need to consider the relationship between the incomes of private practitioners and judicial salaries arises in consequence of the mandatory statutory requirement that we consider, as a criterion relevant to the assessment of the adequacy of judicial salaries, "the need to attract outstanding candidates to the judiciary". This statutory criterion expressly engages recruitment issues that, in turn, give rise to consideration of those factors that encourage or discourage applications for appointment from outstanding candidates. Income differentials are clearly such a factor.

a) The Importance of Recruitment Issues

The *PEI Reference Case* confirmed that the objective is to recruit to the Bench lawyers of great ability and first class reputation.³⁷ This principle was subsequently confirmed by statute upon introduction of subsection 26(1.1)(c) of the *Judges Act*, which identifies the type of candidates to be attracted as those who, by ability and experience, may be regarded as "outstanding". This is significant because many lawyers in Canada apply for appointment, but few are chosen. Between 1990 and 1999, for example, 4,209 applications for appointment to the Judiciary were received.³⁸ This statistic is of limited use, however, because the number of overall applications across Canada does not reflect the number of applications from outstanding candidates. Expressed differently, it is not difficult to encourage 1,000 applications. It is much more difficult to ensure that 1,000 applications from the best applicants are received.

³⁶ Letter from John Honsberger, Q.C., dated January 11, 2000, at 2.

³⁷ *Supra*, fn. 2, at para. 55.

³⁸ Data provided by the Commissioner for Federal Judicial Affairs to the Commission.

Therefore, the Commission specifically considered the category of applicants comprising those who, following assessment by the involved advisory committees, were ranked as "recommended" or "highly recommended" for consideration for judicial office. This analysis revealed that in the same 10-year period (1990 to 1999), 40% (1,682) of the total number of overall candidates were recommended or highly recommended for consideration for appointment. Based on information provided by the Government, we estimate that approximately 25% were ranked as "highly recommended" for appointment³⁹. Overall, 556 candidates were appointed to the Bench.⁴⁰ Even if only the 25% of candidates who were "highly recommended" are considered to be "outstanding", it cannot be said that serious recruitment problems currently exist. Indeed, no party to our inquiry provided evidence of, or suggested, a current recruitment problem.

It is also important to consider the distribution of judicial appointments, in geographic terms, of the 556 persons appointed to the Bench. Information provided to the Commission revealed that in the years 1990 to 1999, of the 556 appointees in Canada, 36.5% were from Ontario, 20.5% were from Quebec, 11.5% were from British Columbia, and 10.4% were from Alberta.⁴¹

At present, there are 1,014 members of the Judiciary, including 192 judges who have elected to serve as supernumerary judges. As pointed out by Counsel for the Government, no segment of the legal profession has a monopoly on outstanding candidates.⁴² Rather, they are drawn from the private bar, provincial and territorial Benches, the academic community and government service. Nonetheless, while it is inappropriate to regard the private bar as the only relevant source of candidates for appointment to the Bench, the data indicate that the overwhelming majority of candidates continues to be drawn from private practice. In the years 1990 to 1999:

- i) 73% of appointed judges were drawn from private practice;
- ii) 11% of appointed judges were elevated to the Judiciary from a provincial or territorial Bench; and

³⁹ Submission of the Government dated March 14, 2000, at Appendix 35.

⁴⁰ Data provided by the Commissioner for Federal Judicial Affairs to the Commission.

⁴¹ *Ibid.*

⁴² Submission of the Government dated December 20, 1999, at para. 28.

- iii) 16% of appointed judges were drawn from government (9%), from the academic community (4%) and from other legal fields (3%).⁴³

If those judges elevated from the provincial or territorial Bench are excluded from the assessment, approximately 82% of those appointed to the Bench in this 10-year period were appointed from the private bar. Thus, it clearly represents the primary source of potential candidates for appointment to the Bench. This underscores the importance and relevance of a comparison between the incomes of lawyers in the private bar and judicial salaries.

b) Available Data Concerning Incomes in the Private Bar

A direct comparison between judicial salaries and the incomes of lawyers is difficult given:

- i) the unavailability of current reliable income data relating to legal practitioners including, in particular, those in the private bar;
- ii) the unavailability of income data of practitioners at the time of their appointment to the Bench;
- iii) the difficulty in isolating appropriate comparison points. As queried by Counsel for the Government, are the average or median earnings of lawyers to be considered, or those of only higher income earners, or of the profession as a whole?⁴⁴
- iv) that available income data does not distinguish between areas of practice. Thus, to the extent relevant, it is not possible on the information available to us to distinguish the reported incomes of litigation versus non-litigation lawyers at the bar.

Because the comparison is difficult, however, it does not follow that it is irrelevant or impossible.

We had available to us a report prepared by Sack Goldblatt Mitchell on behalf of the Conference and Council concerning the "*Incomes of Canadian Lawyers Based on Revenue Canada Income Tax Data*", dated January 31, 2000 and based on 1997 income tax data (the most current

⁴³ *Ibid.*, at Appendix 10.

⁴⁴ *Ibid.*, at para. 27.

available income tax data); a letter dated February 10, 2000 from Hay Management Consultants Limited commenting on the Sack Goldblatt Mitchell report; and detailed submissions by the Conference and Council, and the Government, on the issue. In addition, as described below, the Commission consulted its own experts, Morneau Sobeco, on standard compensation principles and the data provided by the parties. In combination, this formed a sufficient data base to assist us in understanding the current relationship between judicial salaries and the incomes of lawyers in private practice.

The available data make clear that the incomes of private practitioners vary materially by the age and experience of the practitioner, the province or territory in which the lawyer practises, and the geographic location of the practice within each province (that is, whether the lawyer practises in an urban or non-urban setting). The Sack Goldblatt Mitchell report indicates that the average income of the top third by income of those lawyers aged 44 to 56 years who earn more than \$50,000 per year, is \$342,280.⁴⁵ Not unexpectedly, the figures are higher in large metropolitan centres such as Toronto, Calgary and Vancouver. The comparable figure for the top third of lawyers practising in the seven largest census metropolitan areas, as defined by Statistics Canada (the "Largest Metropolitan Areas"), according to the Sack Goldblatt Mitchell report, was \$393,881⁴⁶, in 1997. The Largest Metropolitan Areas examined were: Toronto, Montreal, Vancouver, Ottawa-Hull, Edmonton, Calgary and Quebec City. The Largest Metropolitan Areas account for 52% of the appointments to the Judiciary made since 1989.⁴⁷

The following is noteworthy concerning this information:

- i) the overall data applied to 31,270 self-employed lawyers of all ages in Canada. The data was refined to focus on self-employed lawyers between the ages of 44 to 56 years. We were informed that this age grouping was selected by the Conference and Council because since 1989 approximately 69% of persons appointed to the Judiciary have been in this age grouping;⁴⁸

⁴⁵ Report by Sack Goldblatt Mitchell dated January 31, 2000 and entitled "*Incomes of Canadian Lawyers Based on Revenue Canada Income Tax Data*", at 1.

⁴⁶ Morneau Sobeco calculate this number to be \$399,720.

⁴⁷ *Supra*, fn. 45.

⁴⁸ The data available to the Commission from the Commissioner for Federal Judicial Affairs indicates that in the last 10 years, the overall average age of appointees to the Bench was 50.

- ii) an income exclusion, set at \$50,000, was used by the Conference and Council and their experts to exclude potential distortions in the data that might be occasioned by inclusion of lawyers practising law on a part-time basis. They suggested that this was a conservative approach because lawyers practising full-time, among other matters, likely earn far more than \$50,000, even if they utilize low billing rates.

Issue was taken in several respects with the appropriateness of a \$50,000 income exclusion based on the assumption of part-time employment. It was pointed out to the Commission, for example, that the effect of such an income exclusion was to reduce the number of lawyers covered in the data by almost 48% and, if examined strictly in the 44 to 56 years age grouping, by approximately 39%.

In the Commission's view there may be many explanations, in addition to part-time employment, for income of less than \$50,000 by members of the private bar. These include life-style decisions to moderate work commitments, new practices that are not yet fully established, and less successful or profitable practices. In this connection, it is important to recall that lawyers are not eligible for appointment to the Bench for ten years following their call to the bar. It can be expected that income levels for new lawyers, generally, will be lower than for more experienced lawyers and that, absent income-limiting choices by practitioners, income will increase with seniority, experience and increased profile at the bar; and

- iii) as a result of application of an income exclusion of \$50,000, and the decision to focus on self-employed lawyers between the ages of 44 to 56 years, the number of lawyers to whom the income data applied was reduced from 31,270 to 7,830 (the "Comparator Population");

The Conference and Council suggested, in connection with this income data, that the comparable group of practitioners for the purposes of comparison to judges was the group of lawyers comprising the top third income earners within the Comparator Population, and that the average income of this group was the appropriate comparison point. While this approach recognizes that the majority of judges (as noted, approximately 69%) appointed since 1989 were between the ages of 44 to 56 at the time of their appointment, it also has the effect of targeting an income range with a mid-point at approximately the 83rd percentile within the Comparator Population. In addition, the average income in that range (\$342,280) is above the 87th percentile for lawyers in the Comparator Population.

Hay Management Consultants Limited, on behalf of the Government, expressed reservations about targeting an income range with a mid-point at the 83rd percentile, among other matters, indicating that in the private sector "*an aggressive tie in to comparable market data for executives would be the 75th percentile*".⁴⁹ The experts engaged by the Commission agreed with this observation.

In light of these issues, the Commission sought additional data regarding the net professional income of lawyers in 1997, broken down in multiples of 5 percentiles, between the 50th and 95th percentiles in the Comparator Population. The purpose was to examine the comparable income figures for practitioners within the group of lawyers thought to be the group at the bar most likely to represent the primary source of outstanding candidates for the Judiciary, while at the same time targeting an income range at the 75th percentile of the Comparator Population. The detailed calculations in this regard are attached at Appendix 4 to this report. They revealed the following incomes for lawyers at the 75th percentile:

Alberta	\$283,000
British Columbia	\$236,000
Manitoba	\$176,000
New Brunswick	\$177,000
Newfoundland	\$222,000
Nova Scotia	\$191,000
Ontario	\$260,000
Prince Edward Island	\$179,000
Quebec	\$209,000
Saskatchewan	\$163,000
CANADA	\$230,000

In 1997, the year to which this income data pertains, the salary of a federally-appointed puisne judge of the trial and appellate superior courts was \$172,000. The comparative data suggested

⁴⁹ Letter from Hay Management Consultants Limited to D. Sguyas of the Department of Justice, dated February 10, 2000, at 5.

that a significant gap existed in 1997 between the salary of such judges and the reported incomes of private practitioners at the 75th percentile in the Comparator Population. The gap is higher, lower or eliminated depending upon the geographic location of the practitioner within Canada. The gap is more pronounced in urban areas from which the largest number of appointees to the Bench are drawn. In those centres, the range of incomes for young lawyers is often significantly higher than the salary level of judges. The impact of urbanization on the potential for income in the private bar is clearly demonstrated by the 1997 professional income data available to the Commission. It revealed incomes, at the 75th percentile, of lawyers in the Comparator Population practising in the Largest Metropolitan Areas, as follows:

Toronto	\$343,000
Montreal	\$248,000
Vancouver	\$266,000
Ottawa-Hull	\$198,000
Edmonton	\$163,000
Calgary	\$375,000
Quebec City	\$204,000

As appears from these figures, the gap can vary among urban areas even within the same province (as, for example, between Edmonton and Calgary, Alberta). Overall, there is a significant disparity between incomes within the Largest Metropolitan Areas and other areas. The data available to the Commission indicate that the incomes of practitioners in the Comparator Population at the 75th percentile is \$284,000 in the Largest Metropolitan Areas. Outside these areas, the figure drops to \$158,000. When it is recalled that the current, and historical, approach in Canada to judicial salaries for puisne judges has been the adoption of a flat national salary level, the potential implications of urbanization become more serious.

The Significance of the Judicial Annuity to the Assessment of Salary Levels

For the reasons earlier described in this Report, we also had regard to the value of the judicial annuity in assessing the adequacy of current judicial salaries. We recognized, in both economic and human terms, that the value of future pension entitlements does not assist in the payment of bills due in the present. The pension value, however, is a significant factor to be taken into account in comparing the income position of judges and lawyers in private practice. This is so because lawyers in private practice form the group from whose ranks the majority of judicial candidates are selected. Further, such lawyers generally do not have the benefit of pension arrangements or pension schemes and are obliged to save for their retirement through Registered Retirement Savings Plans ("RRSPs") and from after tax savings on an on-going basis. For some, therefore, it may safely be assumed that the judicial annuity is an important engine driving recruitment. Moreover, the availability of the judicial annuity frees judges from any form of savings plan for retirement, aggressive or otherwise, which lawyers in private practice ignore at their peril.

Therefore, we asked our experts to examine the benefit of the pension with regard to lawyers in private practice, by addressing the following question: what additional salary would a judge require, to purchase the annuity that the judge in fact would receive under current pension arrangements? Expressed differently, were a lawyer in private practice to attempt to save from income an amount sufficient to yield an equivalent pension benefit per annum upon retirement as the current annuity benefit available to judges upon retirement, what amount would the lawyer be required to save per annum?

There is no single answer to these questions, because the calculation depends upon assumptions about the age of retirement of the judge, the gender of the judge, and the economic value of the ability to elect supernumerary status. Our experts made assumptions about these variables that

we believe to be reasonable. Their assumptions and calculations are set out in detail at Appendices 5 and 6 to this report.⁵⁰

Hay Management Consultants Limited, on behalf of the Government, suggested that a 50-year old individual commencing to fund a retirement income of \$120,000 per year and planning to retire at age 65, expecting to live to the age of 80, would need to invest approximately \$57,500 in after tax income per year (assuming a 5% real rate of return on investment), to generate such a retirement income. Assuming maximum annual RRSP contributions, this would require over \$90,000 per year in pre-tax income.

The Commission's experts suggested that the pre-tax estimate of \$90,000, in fact, was somewhat conservative. As a general proposition, they estimated that a judge, appointed at age 50 and retiring at age 65, would require a salary approximately 70% higher in order to fund the annuity available to him or her under the current annuity arrangements. A judge retiring at age 70, in contrast, would require a salary approximately 55% higher to fund the annuity to which the judge would be entitled under the current annuity arrangements. In terms of 1997 dollars, an additional salary of \$95,000 to \$120,000 pre-tax income would be required to fund the judicial annuity if a judge were required to do so, or if a lawyer in private practice sought to fund a similar annuity benefit.

The calculations in Appendix 6 reveal that the base salary of judges in 1997 dollars (\$172,000) was slightly in excess of the average income of two-thirds (62%) of the lawyers in the Comparator Population. When the total compensation of judges in 1997 was taken into account, including an attributed value for the judicial annuity, it exceeded the average income of approximately 79% of lawyers in the Comparator Population, regardless of whether retirement for judges was assumed to be at age 65 or age 70.

⁵⁰ Appendix 5 sets out the assumptions used to calculate the values of the annuity. Appendix 6 provides calculations that illustrate the total 1997 earnings of the Judiciary, including an attributed value for the judicial annuity, in comparison to the net reported income of self-employed lawyers in Canada based on 1997 income tax data in each of the 10 provinces in Canada (except Prince Edward Island) and in each of the Largest Metropolitan Areas, as well as on a national basis. To ensure comparability insofar as possible with the methodology reflected in the Sacks Goldblatt Mitchell report, the comparisons in Appendix 6 were restricted to lawyers in the Comparator Population.

As shown in Table 2.4 below, if the comparison is made at the 75th percentile of the Comparator Population, the base salary of judges in 1997 was less than the average income of lawyers at the 75th percentile in all provinces in Canada except Saskatchewan. However, when the total compensation of judges in 1997 is taken into account, including an attributed value for the judicial annuity, it exceeded the average income of private practitioners at the 75th percentile on a Canada-wide basis in all areas, except in Toronto and Calgary⁵¹.

Table 2.4
Estimated Percentage Gaps between the Compensation of Judges
and the Incomes of Private Practitioners at the 75th percentile
in the Comparator Population, 1997 data

Geographic Area	Income of Private Practitioners at the 75 th percentile in the Comparator Population \$	Percentage Gap Between the Compensation of Judges and Incomes of Lawyers (positive indicates that judges compensation exceeds lawyers income), based upon		
		Judges Salary (\$172,000)	Judges Salary adjusted for benefit of judicial annuity, estimated at:	
			\$267,000	\$292,000
CANADA	230,000	-25.2	16.1	27.0
Alberta	283,000	-39.2	- 5.7	3.2
British Columbia	236,000	-27.1	13.1	23.7
Manitoba	176,000	- 2.2	51.7	65.9
New Brunswick	177,000	- 2.8	50.8	65.0
Newfoundland	222,000	-22.5	20.2	31.5
Nova Scotia	191,000	- 9.9	39.8	52.9
Ontario	260,000	-33.8	2.7	12.3
Prince Edward Island	179,000	- 3.9	49.2	63.1
Quebec	209,000	-17.7	27.8	39.7
Saskatchewan	163,000	5.5	63.8	79.1
LARGEST METROPOLITAN AREAS				
	\$			
Toronto	343,000	- 49.8	-22.2	-14.9
Montreal	248,000	-30.6	8.7	17.7
Vancouver	266,000	-35.3	0.4	9.8
Ottawa-Hull	198,000	-13.1	34.8	47.4
Edmonton	163,000	5.5	63.8	79.1
Calgary	375,000	-54.1	-28.8	-22.1
Quebec City	204,000	-15.7	30.9	43.1

⁵¹ As indicated in Table 2.4, at the level of \$267,000 for total judicial compensation, judges' compensation is also less than the overall average income of practitioners in the Province of Alberta.

When this data is reviewed in the context of urban versus non-urban settings, it becomes clear that profound disparities exist between the total compensation of judges (including an attributed value for the judicial annuity) and the incomes of lawyers in the Comparator Population, depending upon geographic location. What is critical to this analysis is the impact of regionalization and urbanization within various regions.

It is apparent, therefore, that use of a uniform national salary scale for the Judiciary fails to take into account pronounced regional disparities in the income of those practitioners considered, at least by the Judiciary, to form the group of lawyers most likely to generate outstanding candidates for judicial appointment.

The Commission therefore considered whether some compensation arrangement should be recommended which specifically took into account and responded to the financial disparities created by regionalization and urbanization. One of the most obvious ways to address this issue would be to recommend a salary differential between members of the Judiciary serving in urban, versus non-urban settings. Other creative ways may also be available to compensate judges serving in urban centres without introducing a base salary differential.

In considering this matter, we noted the observation of the Lang Commission (1983) which concluded that the implications of regionalization should be considered by successor commissions.⁵² We were conscious, however, of the fact that no party to our inquiry recommended the creation of a salary differential between members of the Judiciary based on the geographic location of residence of the judge. Indeed, both the Government, and the Conference and Council indicated during the Commission's public hearings that they did not support such a differential⁵³. We were also concerned that creation of such a differential, or the adoption of other differentiating income mechanisms, could have the practical effect of creating many different classes of judges at the same level within the Judiciary, in fact or in perception. In our view, this would not be in the public interest or in the interests of the administration of justice cherished in this country.

⁵² Lang (1983), at 7.

⁵³ Transcript of the February 14, 2000 Public Hearing, Vol. II, at 232 to 237.

While it may be that introduction of some differentiating income mechanism will be warranted in the future, so as to take into account directly the negative financial impact of regionalization and, in particular, urbanization, for the reasons indicated, we have decided not to recommend such an approach at this time. While we are mindful of the income disparities created by regionalization, demonstrated by the Sack Goldblatt Mitchell report and the additional income data provided to the Commission and presented at Appendix 6, we do not think it responsible to suggest that the salary level of the Judiciary should be set so as to match the income of the highest income earning lawyers in the largest urban centres in Canada. What is required, in our view, is the striking of an appropriate balance in order to ensure that the judicial salary level is sufficient to continue to attract outstanding candidates to the Bench, including outstanding candidates from the most lucrative of legal services markets in Canada, and that current and future judges serving in urban areas receive a fair and sufficient salary.

We therefore concluded that the assessment of the adequacy of judicial salaries in relation to the incomes of private practitioners must take into account the following:

- i) the total compensation of judges includes a significant pension annuity that has substantial value when a comparison of judicial compensation to the income of private practitioners is undertaken;
- ii) continued use of a uniform national salary scale for puisne judges will have an adverse differential impact in different regions of the country and, therefore, potentially on the ability to attract outstanding candidates to the Judiciary in some areas of the country; and
- iii) while judicial salaries should not be set according to the most lucrative legal services market, they must be set at a level which will not have a chilling effect on recruitment by serving as a disincentive to outstanding candidates in the Largest Metropolitan Areas, including those urban centres in which lawyers in private practice realize the highest incomes. They must also be set at a level that does not result in unfairness to those current and future judges residing in larger urban areas.

Pension Benefits of DM-3s

As noted, we believe that the value of the judicial annuity is a significant and relevant factor to be considered in assessing the adequacy of judicial compensation in comparison to the incomes of lawyers in private practice. It is clear to us that this comparison is both necessary and useful because the incomes of lawyers in private practice affect recruitment among the class of persons from whom most judges are drawn.

It is less clear that it is appropriate to have regard to the comparative positions of DM-3s and judges in relation to annuity benefits. We recognize that there will be differing views on this issue. We thought it important to at least be aware of the facts concerning the value of the pension benefit available to DM-3s.

We therefore requested the experts engaged by the Commission to determine the additional salary that would be required, as a percentage of pay, to accumulate in after-tax savings funds necessary to provide a retirement income equivalent to the difference between the judicial annuity and the DM-3 pension (and special retiring allowance, where applicable). The additional value of a judicial annuity, compared with a DM-3 pension, increases with the age of appointment of the judge and the DM-3. Later ages of appointment, and shorter terms of service, provide substantial pension benefits to judges compared to pension benefits available to DM-3s. For example, if a judge appointed at age 50 were required to purchase the pension benefits to which he or she is entitled under the current pension regime, over and above those currently available to a DM-3 appointed at the same age, the judge would require a salary approximately 25% higher than that paid to the DM-3 (assuming a salary of \$200,000 in the year 2000). If one assumes that the judge was appointed at age 40, however, and retires at age 65 after 25 years service, only about 2% additional salary would be required for the judge to purchase the additional pension benefits received, over and above those currently available to a DM-3 who serves for a similar period. On the same assumptions, if the judge retires at 70 years of age, no additional salary would be required. Particulars of the calculations carried out by the Commission's experts in this regard, and the assumptions underlying them, are set out at Appendix 5 to this report.

Judges' Salaries in Other Jurisdictions

The Commission was also requested by the Conference and Council to take into account the current salary levels applicable to judges in other jurisdictions. We were informed that effective April 1, 1999, the salary of an English High Court Judge is approximately \$309,500 (Cdn) and that Circuit Judges in England now receive the equivalent of approximately \$232,000 (Cdn). Moreover, District Judges in England, who have a more limited jurisdiction than do members of the Canadian Judiciary, currently receive a salary of approximately \$186,000 (Cdn). The Commission was also provided with some data concerning judicial salary levels in Australia, New Zealand and at the Federal Circuit Court level in the United States.

In every instance made known to us, the salary level of judges in other jurisdictions exceeds the current salary, sometimes significantly, of the Canadian Judiciary. Care must be taken, however, not to assess these figures out of context. The utility and reliability of comparisons between judicial salaries in other jurisdictions and those in this country are questionable on the basis of the information now available to us. This is so, in our view, because of variations between economic and social conditions in Canada and the other identified jurisdictions, fluctuating exchange rates, significantly different income tax structures, differing costs of living and the absence of information concerning the retirement benefits of judges in the other identified jurisdictions. Without further, and more detailed, information regarding the process for setting judicial salaries in other jurisdictions, the nature and extent of the responsibilities of the judges in those jurisdictions suggested to be comparable to Canada, and the overall total compensation scheme applicable to judges in the other identified jurisdictions, we are unable to place significant reliance on data concerning judges' salaries in other jurisdictions.

2.4 Recommendations Concerning Salaries for Puisne Judges

We have attempted in our recommendations to be fair both to the Judiciary and taxpayers. We believe that our recommendations for judicial salaries are in the public interest and strike the appropriate balance.

Recommendation 1

The Commission recommends that the salary of puisne judges be established as follows:

Effective April 1, 2000: \$198,000, inclusive of statutory indexing effective that date;

Effective April 1, 2001: \$200,000, plus statutory indexing effective that date;

Effective April 1, 2002 and 2003, respectively: the salary of puisne judges should be increased by an additional \$2,000 in each year, plus statutory indexing effective on each of those dates.

2.5 Salary Differentials for Trial and Appellate Judges

The appellate judges of six Courts of Appeal in Canada (Alberta, Saskatchewan, Manitoba, Ontario, Quebec and New Brunswick) urged the Commission to recommend a salary differential between appellate and trial court judges. They requested a recommendation that the salaries for federally-appointed appellate court judges be fixed at that amount which is the mid-point between the salaries of puisne judges of the trial court and the salaries of puisne judges of the Supreme Court of Canada. They also requested that we recommend that the salaries of the Chief Justices of the appellate courts continue to be set at an amount that represents the same approximate percentage by which the salaries of those Chief Justices now exceed the salaries of judges of their respective courts, that is, approximately 10%.

The Commission received both a written submission on behalf of the appellate judges and an oral presentation by Mr. Justice J. Michel Robert of the Quebec Court of Appeal supporting salary differential recommendations. The Commission also received a written submission from Mr. Justice Ronald L. Berger of the Court of Appeal for Alberta, submitted in his individual capacity as a puisne judge of that Court, opposing any such salary differential. The Conference and Council took no position on the request for a salary differential between appellate and trial court judges.

In the written submissions delivered on behalf of the various appellate courts and in the oral presentation of Mr. Justice Robert, a number of significant factors were outlined in support of the proposal for differential salaries between trial and appellate court judges. Any summary of those factors in this report would not do justice to the full reasoning identified by the requesting appellate courts. Briefly, however, the main arguments advanced in support of differential salaries were as follows:

- i) when regard is had to the hierarchical organization of the Canadian judicial system, it is clear that salary differentials already exist for all levels of courts, save that no increased salary is paid to judges in the appellate courts. For example, salary differentials now exist between judges on the Supreme Court of Canada and other courts; between judges on the trial courts in each province and provincial court judges and masters in each province and territory; and between justices of the peace and commissioners, or their equivalents, and judges at various levels in all provinces and territories. Thus, it might be said that salary differentials are currently the norm in Canada, with one prominent exception, namely, the absence of a differential between the salaries of trial and appellate court judges;
- ii) other common law countries, including the United Kingdom, Australia, New Zealand, and the United States provide for salary differentials between their trial and appellate courts;
- iii) the responsibilities and obligations imposed on appellate courts in Canada are extensive. The appellate courts in the provinces and territories, in practical terms, are courts of last resort for the overwhelming majority of cases. This is reflected in the fact that more than 98% of the cases in some provinces never reach the Supreme Court of Canada. These facts underscore the importance of the jurisprudential development role of the appellate courts in the provinces and the territories. In this context, it may be argued that a salary differential between trial and appellate courts is as justified as the current salary differential between appellate courts and the Supreme Court of Canada;
- iv) the costs of implementing a salary differential for trial and appellate judges would not be excessive having regard to the relatively limited number of appellate judges (138); and
- v) finally, the absence of a salary differential in Canada between trial and appellate court judges may be characterized as an historical anachronism arising from an era in history pre-dating the creation of separate courts of appeal. The reality of the current court structure in Canada, it was argued,

necessitates bringing compensation policy for trial and appellate court judges in this country into line with those of other common law countries and, as well, with the contemporary reality of our court system.

The Commissioners regarded many of these arguments as compelling. We were concerned, however, with the opposition to such a salary differential advanced both by the Government and by Mr. Justice Berger of the Court of Appeal for Alberta. We also noted that some appellate courts did not join in the request for a salary differential. Mr. Justice Berger made it clear in his written submission that his remarks to the Commission were made on his own behalf only. He argued that:

- i) the absence of hierarchical distinctions among federally-appointed judges strengthens collegiality and fosters mutual respect. This traditional legal culture, he suggested, promotes constructive and useful interaction among members of both levels of court. In his view, the adoption of a salary differential between trial and appellate court judges would give rise to a *"very real risk of destroying the goodwill, collegiality and interaction that we have worked so hard to achieve"*; (at 2)
- ii) some trial judges sit from time to time with courts of appeal. A pay differential among judges performing the same judicial function, Mr. Justice Berger suggested, would be both undesirable and potentially vulnerable to constitutional challenge. The alternative solution, of paying those trial judges who sit with appellate courts a special *per diem* or *ad hoc* pay amount, would have the effect of creating two classes of judges performing the same functions; and
- iii) members of appellate courts sit as a group thereby sharing collective responsibility for the outcome of cases argued before them and diffusing the workload and responsibilities within the group. This contrasts to the daily tasks of individual trial judges who bear their decision-making responsibilities alone.

The Government argued that the Commission should not recommend a salary differential for trial and appellate judges absent evidence that the work of appellate judges is more onerous or of greater value than that of trial judges. This, it was submitted, would require an objective and principled assessment of the responsibilities of both appellate and trial judges. Moreover, the Government suggested that recommendations for such a salary differential should not be made without consultation with affected provinces. The Government maintained that a salary

differential could have implications for the structure of the system of courts within the provinces, giving rise to constitutional issues under the *Constitution Act, 1867*. This is so, it was suggested, because legislative responsibility for the structure of the system of courts within Canada rests with the provinces.

We recognized the merits of the arguments made by various parties on this issue. The proposal for a salary differential between trial and appellate court judges is of significant importance and far-reaching implication having regard to the traditions of the Canadian judicial system and the historical construct of our court system. We concluded that any decision on the matter necessitates an in-depth review and evaluation of more extensive information than is currently available to us. Such additional information, we suggest, might usefully include data concerning the current workloads and responsibilities of trial and appellate courts across the country, the history of salary differentials in other comparable jurisdictions, and consideration of potential constitutional issues identified by various of the parties. We would be prepared to consider this matter in further detail, should it be made the subject of a referral to us pursuant to the *Judges Act* (Canada) within the term of our mandate.

2.6 Salary Levels for Other Judges

For many years a relatively constant differential has been maintained between the salaries of puisne judges and Chief Justices/Associate Chief Justices. No party before the Commission suggested that this differential should be altered. Chief Justice Lamer, on behalf of the Canadian Judicial Council, requested that the Commission recommend continuation of approximately a 10% differential between the salaries of puisne judges and the salaries of their Chief Justices and Associate Chief Justices. The Commission sees no reason to alter this well-established relationship.

Recommendation 2

The Commission recommends that the salaries of the Justices of the Supreme Court of Canada, and the Chief Justices and Associate Chief Justices should be set, as of April 1, 2000 and inclusive of statutory indexing effective that date, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	\$254,500
Justices	\$235,700
Federal Court and Tax Court:	
Chief Justices	\$217,100
Associate Chief Justices	\$217,100
Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	\$217,100
Associate Chief Justices	\$217,100

As of April 1 in each of 2001, 2002 and 2003, these salaries should be adjusted to maintain the same proportionate relationship with the salary of puisne judges established as of April 1, 2000.

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CHAPTER 3

OTHER ALLOWANCES

Under section 27 of the *Judges Act* provision is made for various annual allowances to judges. These allowances are referred to as "Incidental Allowances", "Northern Allowances" and "Representational Allowances".

Incidental Allowances cover such things as the cost of repair and replacement of court attire, the purchase of law books and periodicals, memberships in legal and judicial organizations, the purchase of computers and other assorted expenses associated with the position. The purchase of art, furniture and rugs, hospitality costs, and expenses relating to spouses and to office personnel are not covered.

Northern Allowances are paid to judges working in the northern communities. They are intended to provide compensation for the higher cost of living in those locations.

Representational Allowances cover travel and other expenses actually incurred by a judge or the spouse of a judge in discharging the special extra-judicial obligations and responsibilities that are required of their position. Representational Allowances, like Incidental Allowances, cover only those expenses not covered elsewhere under the *Act*.

3.1 Incidental Allowances

Subsection 27(1) of the *Judges Act* provides that the Judiciary are entitled to be reimbursed up to \$2,500 each year for "*reasonable incidental expenditures that the fit and proper execution of the office of judge may require, to the extent that the judge has actually incurred the expenditures*

and is not entitled to be reimbursed therefor under any other provision of [the Judges Act]". They have been set at the same level since 1989.

Several parties in their submissions to the Commission indicated that the level of Incidental Allowances was no longer adequate and requested that it be adjusted to reflect the true cost of expenditures. The Conference and Council cited, as examples, the increased cost of law books and the growing need for computers and information on CD-ROM. Increases to levels between \$3,200 and \$5,000 were suggested. It was also initially requested that Incidental Allowances should be indexed, a request that was opposed by the Government. The issue became moot, however, because at the public hearing on February 14, 2000 the Conference and Council withdrew the request for indexing of Incidental Allowances.

The Commission agrees that Incidental Allowances should be adjusted upward to better reflect the cost of goods in today's marketplace.

Recommendation 3

The Commission recommends that Incidental Allowances be adjusted to a level of \$5,000 per year effective as of April 1, 2000.

3.2 Northern Allowances

Under subsection 27(2) of the *Judges Act*, judges in the northern territories are entitled, in addition to Incidental Allowances, to a yearly allowance of \$6,000 as compensation for the higher cost of living in the northern communities.

Seven judges currently receive Northern Allowances. The amount of the Northern Allowances was last adjusted in 1989.

The Conference and Council, in their submissions, requested an increase to between \$16,000 and \$20,000 citing the allowances paid to public servants under the Treasury Board's Isolated Posts Directive (the "IPD") as a comparator. The IPD provides for an environmental allowance

and adjustments for cost of living and fuel and utility differentials at site specific locations in the territories and in the provinces.

The Government submitted that the IPD was not a good comparator, and argued that the environmental allowance provided for under the IPD is used for recruitment and retention purposes and should not apply to judges. The Government did note that the cost of living is higher in the territories, particularly in Nunavut, and that the Northern Allowances should be reviewed. It asked for the Commission's advice on the scope, structure and amount of these Northern Allowances.

Northern Allowances under the IPD vary between locations. Judges qualifying for Northern Allowances reside in Whitehorse, Yellowknife and Iqaluit. Using the IPD, allowances of \$5,123, \$9,161 and \$15,356, including the environmental allowance, respectively, would apply. If the environmental allowance component is excluded, as urged by the Government, and only the cost of living adjustment is considered, the Northern Allowances would be \$3,088, \$5,338 and \$10,108, respectively.

In our view there are sound reasons to maintain the traditional approach of having a uniform level of Northern Allowances. We looked at the numbers provided for under the IPD, in particular those for Iqaluit, which range from \$10,108 to \$15,356. We decided that \$12,000 was an appropriate Northern Allowance for all three locations.

Recommendation 4

The Commission recommends that Northern Allowances be adjusted to a level of \$12,000 per year effective as of April 1, 2000.

3.3 Representational Allowances

Under subsection 27(6) of the *Judges Act*, the Chief Justice of Canada, puisne judges of the Supreme Court of Canada, Chief Justices of the Federal Court and the Chief Justices of each of

the provinces, other specified Chief Justices and Judges, and the Chief Judge and Senior Judges of the northern territories are entitled to be paid Representational Allowances.

The maximum yearly amounts currently allowed for Representational Allowances are listed below.

Chief Justice of Canada	\$10,000
Chief Justices of the Federal Court of Canada and the Chief Justice of each province	\$ 7,000
Supreme Court of Canada Puisne Judges, Trial Chief Justices, Other Designated Chief Justices and Senior Judges	\$ 5,000

The amount of these Representational Allowances has not been changed since 1985. The Supreme Court of Canada and the Canadian Judicial Council (the "Council") made submissions to the Commission requesting increases in the maximum yearly limits. The Courtois Commission (1990) recommended that the levels be increased to \$15,000, \$10,000 and \$8,000, respectively. Bill C-50, which was introduced in December 1991, contained the increases recommended by the Courtois Commission. However, Bill C-50 died on the Order Paper. Two years later, the Crawford Commission (1993) concluded that the recommendations of the Courtois Commission were still adequate and endorsed the same levels. No Bill was introduced to implement these recommendations.

Both the Supreme Court of Canada and Council suggested that, after 15 years, the maximum level for these Representational Allowances is no longer adequate and that an increase is necessary to cover the increasing demands on judges to participate in activities both inside and outside of Canada. Both of these parties requested that the Representational Allowances be indexed annually and suggested that they be increased to \$22,500 for the Chief Justice of Canada, \$15,000 for Chief Justices of the Federal Court and provinces, and \$12,000 for other eligible judges. Submissions were based on increasing either the current levels, or the levels

recommended by the Courtois Commission, according to various indexation measures.

The Government's submission noted that automatic indexation of allowances, generally, was not necessary, stating that "*while judicial independence may require indexing protection to prevent erosion of judicial salaries by inflation, the same cannot be said for allowances*"¹. The Government maintained that this was particularly true for Representational Allowances and that a review of them on a quadrennial basis was sufficient.

We agree that the maximum level for Representational Allowances should be increased to reflect the increase in the cost of living over the past 15 years. We also agree with the Government that the Commission should review the amount of the Representational Allowances every four years.

We indexed the Courtois Commission's recommendations, as if implemented in 1990, to 1999 using both the IAI index and the CPI index to determine the range in which those recommendations would be today. We believe that the resulting levels are a valid basis for establishing current Representational Allowances.

Recommendation 5

The Commission recommends that, effective as of April 1, 2000, Representational Allowances be set as follows:

Chief Justice of Canada	\$18,750
Chief Justices of the Federal Court of Canada and the Chief Justice of each province	\$ 12,500
Supreme Court of Canada Puisne Judges, Trial Chief Justices, Other Designated Chief Justices and Senior Judges	\$ 10,000

¹ Submission of the Government of Canada dated January 21, 2000, at 9, para. 39.

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CHAPTER 4

JUDICIAL ANNUITIES

As we noted earlier in this report, the pension arrangements to which members of the Judiciary are entitled are an integral part of their total compensation and a critically important element in attracting outstanding candidates to serve as judges. They are also extraordinary, if not unique, in the sense that no other pension arrangements in Canadian society are structured in the way that judicial annuities are structured.

In this Chapter, we make substantial recommendations that will change the nature of the judicial annuity arrangements. It is important to understand the context in which we are putting these recommendations forward. Therefore, we begin with a brief historical review of how the judges' annuity scheme has evolved to its present state, and a summary of the current regime, noting the major points that differentiate it from other, more broadly representative, retirement income schemes.

4.1 Evolution of Annuity Arrangements¹

Members of the Judiciary are entitled to a pension by virtue of Section 100 of the *Constitution Act, 1867*. They are the only group in society that is constitutionally entitled to such a benefit.

From the time of Confederation until 1919, federally appointed judges were entitled to retire voluntarily after 15 years of service with an annuity equal to 2/3 of their salary ("a 2/3 annuity"). There were no mandatory retirement provisions and judges could choose to work, at full salary, for as long as they lived. From 1903-1919, provision existed for judges to retire voluntarily at

¹ This section draws largely on the historical review contained in the Submission of the Conference and Council dated December 20, 1999, at 3-7 to 3-14.

full salary upon reaching age 75 with 20 years of service, or age 70 with 25 years of service, or any age with 30 years of service.² Judges made no contributions toward the cost of these retirement income arrangements.

In 1919, Parliament converted the right to retire voluntarily after 15 years of service with a 2/3 annuity to a benefit, available only when the Governor-in-Council decided that a given retirement would be "in the public interest". Parliament also eliminated the right to retire on full salary for future appointees. As a result, judges had no automatic retirement income rights, although they continued to have the right to lifetime tenure with full salary. These arrangements continued until 1927.

Over the period from 1927 to 1960, a number of changes were made that, in concert, removed the right of lifetime tenure by introducing mandatory retirement concepts. Mandatory retirement at age 75 for justices of the Supreme Court and the Exchequer Court was introduced in 1927 and compulsory retirement was accompanied by an annuity of 2/3 of salary. In 1960, a constitutional amendment imposed mandatory retirement provisions for all Superior Court judges at age 75 and related amendments to the *Judges Act* provided a 2/3 annuity for all judges on retirement. From 1960 forward, a judge was required to retire on a 2/3 annuity at 75 years of age, and was entitled to retire voluntarily with a 2/3 annuity if he or she had attained the age of 70 and had served at least 15 years on the Bench. The annuities were still non-contributory.

The next change came when Parliament introduced the concept of supernumerary judges. Supernumerary judges are judges that have reached eligibility for retirement, but elect to continue to work on a half-time basis for full salary. In 1971, judges could elect supernumerary status at age 70 with 10 years of service. In 1973, election of supernumerary status was extended to judges of 65 years of age with a minimum of 15 years of service. Judges eligible for retirement could elect supernumerary status for up to 10 years. The introduction of supernumerary judges helped deal with a serious backlog of cases at the time by opening up

² Friedland, Martin L., *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council, Ottawa: 1995, p. 67.

additional positions for the appointment of new judges, while retaining the expertise of highly experienced judges on a part-time basis.

In 1975, judges' annuities were made contributory. Judges appointed before February 17, 1975 were required to contribute 1.5% of salary annually, which at the time was said to be on account of improvements to survivors' benefits that were then introduced. Judges appointed after February 17, 1975 were required to contribute 7% of salary, which included 1% for the indexation of retirement income to inflation. This decision of Parliament was very controversial, both because it broke the tradition of non-contributory pensions and because, by grandfathering certain judges, it created a situation where judges who were doing exactly the same work were compensated differentially (after contributions) depending upon the date of their appointment. The decision was the subject of consideration by the Dorfman Commission (1978) and by a special Advisory Committee set up to consider judicial annuities that was chaired by Jean deGrandpre and reported in 1981. The decision was also appealed to and upheld by the Supreme Court of Canada.³

Two further changes affected judicial annuities during the 1990s.

In 1992, Parliament revised the framework that governed tax assistance available for retirement savings. In essence, the changes set a maximum value of tax assistance for individuals regardless of whether they were accumulating retirement income through registered pension plans or RRSPs. As a result of these changes, judges -- who had previously been able to contribute to individual RRSPs to augment their judicial annuities -- were no longer able to do so. This decision was appealed unsuccessfully to the Federal Court of Appeal. Our understanding is that leave to appeal to the Supreme Court is currently being sought.⁴

In 1998, in response to recommendations by the Crawford (1993) and Scott (1996) Commissions, Parliament amended the *Judges Act* to allow for voluntary retirement with an annuity equal to 2/3 of salary under what is known as a "modified Rule of 80". That is, with a

³ *The Queen v. Beauregard*, [1986] 2 S.C.R. 56

⁴ *Trussler v. R.*, [1999] 3 C.T.C. 580.

minimum of 15 years of service, a judge can now retire with a 2/3 annuity when age plus years of service total 80.

4.2 Current Situation

The main characteristics of the current annuity scheme for judges are the following:

- i) the maximum annuity that can be received is a 2/3 annuity calculated at the date of actual retirement;
- ii) the plan is contributory. Virtually all judges now contribute 7% per annum, 1 percentage point of which is on account of post-retirement indexation. Contributions are fully deductible under the *Income Tax Act* and judges are entitled to RRSP contributions of only \$1,000 per year while they are contributing to their annuity scheme. Judges make contributions until they actually retire and begin drawing an annuity, even though they may become eligible to retire at an earlier date;
- iii) a judge is eligible to retire, with a 2/3 annuity, in the following circumstances:
 - a) after serving 15 years in office, with a combined age and years of service that total 80;
 - b) after serving at least 15 years, where in the opinion of the Governor-in-Council, the resignation of the judge is conducive to the better administration of justice or is in the national interest;
 - c) where a judge has become afflicted with a permanent disability that prevents the performance of judicial duties;
 - d) where a judge reaches the mandatory retirement age with at least 10 years of service; or
 - e) where a judge of the Supreme Court of Canada attains the age of 65 and has served at least 10 years on that Court;
- iv) a judge who is 65 years of age and has at least 15 years service may elect to become a supernumerary judge for up to 10 years, until the age of compulsory retirement. A supernumerary judge continues to work at full salary, but at a reduced workload (generally 50% of a full workload). A supernumerary judge, even though eligible for retirement, continues to make contributions of 7% per year to the annuity scheme;

- v) a judge who is eligible to retire with a 2/3 annuity, but is younger than 65, may choose to continue working full time until age 65 at which point the judge becomes eligible for supernumerary status; and
- vi) a judge must retire at age 75. If service at age 75 is less than 15 years but greater than 10 years, the judge will receive a 2/3 annuity. If service at age 75 is less than 10 years he or she will receive 1/10 of a 2/3 annuity for each year of service.

At the time that the judges' annuity scheme was introduced, employer-sponsored pension plans were relatively rare. Over the past decades they have grown in importance and legislative frameworks have been developed federally and provincially to ensure that they meet certain basic minimum criteria. When the judges' plan was made contributory in 1975, and when judges were denied the right to contribute to RRSPs in 1992, their overall annuity scheme began to take on some of the characteristics of employer-sponsored plans. Major differences, however, remain.

Most employer-sponsored plans are structured in a way that allows an individual to accrue a certain percentage of salary every year, with a pension benefit based upon the rate of accrual, times the number of years of eligibility, times an average of the last several years of salary (usually three years or five years). These plans typically have a maximum allowable pension of about 70% of average final salary. The judges' plan differs in several important respects:

- i) basing the annuity on final salary, rather than on an average of salaries, is more generous than most employer-sponsored plans, but using a maximum of 2/3 rather than 70% tends to compensate for this;⁵
- ii) the 2/3 maximum annuity is "earned" entirely at the time the judge becomes eligible for an annuity. There is no vesting and there are no accrual rights. This means that individuals appointed at different ages will have *implicit* accrual rates that vary from one individual to another. For example, a judge appointed at age 40 could retire with a full annuity at age 60, accruing that annuity over a twenty-year working span, while a judge appointed at age 50, five years after the appointment of the 40 year old, could retire at the same time as the 40 year old, aged 65, with exactly the same annuity accrued over a fifteen-year working span. This situation is characterized by the

⁵ With reasonable growth in salaries, 2/3 of final salary becomes similar to 70% of the average of several past years. For example, using the average of past five years (the benchmark for the public service plan) and assuming the same salary five years before retirement and a growth rate of 3% per year for the last five years of employment, then 2/3 of the final salary would equate to 70.7% of the five-year average.

Conference and Council as "*leading to unequal treatment among judges (a characteristic which raises Charter implications)*";⁶

- iii) because there is no vesting or accrual, there is no right to early retirement with a pro-rated pension. If a judge retires prior to attaining eligibility for a full annuity according to the modified Rule of 80, there is no provision for the payment of a pro-rated or partial annuity, other than for a judge aged 75 with less than 10 years of service. In all other cases, judges are entitled only to a return of contributions with interest, regardless of how long they have served; and
- iv) finally, the overall structure of the judges' plan makes it more generous financially than most employer-sponsored contributory pension plans. Insofar as we are aware, only "top-hat", or supplementary executive retirement plans in the private sector, which are generally non-contributory, are sometimes more generous. As a point of comparison, for example, judges' contributions amount to between 19% and 25% of the present value of their annuities, depending upon actuarial assumptions.⁷

4.3 Major Issues

The Conference and Council, in their submissions to the Commission, devoted considerable attention to the inequities that they suggested arise as a result of the operation of the modified Rule of 80. In particular, they pointed out that younger appointees are compelled to work more years and pay longer before being entitled to retire with exactly the same benefits as colleagues who may have been judges for a considerably shorter time. They submitted that this requirement raises serious equality issues, in particular since a majority of recent younger appointees are women. The Commission has taken this concern very seriously. We have sought and obtained expert advice on whether the modified Rule of 80 might be successfully challenged under section 15 of the *Charter*. We outline that advice, and our own conclusions, below.

The Conference and Council sought a number of recommendations from the Commission that, in their view, were essential to both redress inequities in the annuity scheme and to repair inadequacies in the current retirement package. In particular, they urged that the annuity scheme be amended such that:

⁶ Submission of the Conference and Council dated December 20, 1999, at 3-2.

⁷ Submission of the Government dated April 14, 2000, at Appendix 52.

- i) the modified Rule of 80 be amended to delete the requirement for 15 years of service, making it an "unencumbered Rule of 80";
- ii) eligibility for retirement on a full annuity of 2/3 salary to occur at the earlier of attaining 15 years of service (with the annuity payable at age 60) or when the judge would be eligible under the unencumbered Rule of 80;
- iii) contributions to the annuity scheme cease after 15 years of service;
- iv) the right to contribute to an RRSP be reinstated after 15 years of service;
- v) the right to elect supernumerary status for up to 10 years be available after 15 years of service, provided the judge is at least 55 years of age at that time;
- vi) judges have the right to elect early retirement at any age after 10 years of service, with a prorated annuity payable at age 60 (based on salary that would have obtained at age 60 and with no actuarial reduction) or payable immediately with an actuarial reduction of 3% per year;
- vii) there be more generous pro-ration rules for judges who retire with less than a full pension after the age of 65;
- viii) the current provision of the *Judges Act* that limits survivors to receipt of only one judicial pension be eliminated;
- ix) survivors' benefit provisions be amended to bring the law into conformity with existing law and jurisprudence concerning common law and same sex relationships;
- x) survivors' benefits be increased at Government expense and additional options be provided for election by judges at their expense;
- xi) single judges be entitled to benefits equivalent to those that are received by judges with survivors;
- xii) all pensions be adjusted annually so that they would be based on the higher of the original pension indexed for inflation, or the current judicial salary being paid; and
- xiii) judges have the right to increase their annuity beyond 2/3 of final salary at a rate of an additional 2.2% of salary for every year (or partial year) of full-time work beyond 15 years and/or an additional 1.1% for every year (or partial year) of supernumerary work.

The Government, in its initial submission, expressed the view that "*changes that would alter fundamental features of that scheme [i.e., the current annuity scheme], should only be*

undertaken following a comprehensive review of the structure and function of the scheme in the face of changing demographics and new demands".⁸ The Government informed the Commission in that submission that:

*The Minister of Justice intends to refer to the issue of the adequacy of the current judicial annuity scheme to the Judicial Compensation and Benefits Commission for consideration sometime following June 1, 2000. The Government invites the Commission's views about the appropriate timing of such a review, as well as any preliminary views as to the scope, design and conduct of the review.*⁹

The Government acknowledged that issues related to the provision of survivors benefits to survivors who were in a common-law or same-sex relationship with judges should be addressed outside the scope of this broader review, as should the requirement for judges to continue to make contributions to their annuity arrangements after they had completed the necessary service to be eligible for a full annuity.

In its reply submission of January 21, 2000, the Government presented cost estimates of the amendments proposed in the initial submission of the Conference and Council. The estimated costs of all the amendments to the annuity scheme on an accrued liability basis for the 1,014 members of the Judiciary who would be affected, ranged between \$499 million and \$594 million. The actual cost increase in fiscal year 2000-2001 ranged from \$28.3 million to \$35.3 million. These costs reflect changes proposed to the annuity scheme based on continuation of 1999 salary levels. They would be higher with an increase in salary.¹⁰

At the public hearing held by the Commission on February 14, 2000, Counsel for the Conference and Council informed the Commission that they accepted the costing numbers of the Chief Actuary that had been submitted to the Commission.¹¹ Counsel also indicated at this time that the last three requests enumerated in the above list, as well as the request with respect to enhanced pro-ration on early retirement for judges who had served beyond 65 years of age, were

⁸ Submission of the Government dated December 20, 1999, at 17, para. 66.

⁹ *Ibid.*, at 17, para. 68.

¹⁰ For example, these estimates calculated that increasing the salary level to \$225,000 on April 1, 2000, as requested by the Conference and Council, would increase accrued liabilities by \$130-170 million, and actual costs by \$10.2-13.9 million. See Reply Submission of the Government, January 21, 2000, Appendix 29, at 3.

¹¹ Transcript of the February 14, 2000 Public Hearing, Volume II, at 273.

no longer being advanced by the Conference and Council as amendments that should be considered in this inquiry. What this meant, in terms of the cost of potential amendments to the annuity scheme, was a reduction in the cost estimates provided by the Government of between \$430 and \$510 million in accrued liabilities and between \$17.5 and \$21.9 million in annual costs.

In light of this revised position, and having considered the submissions of the principal parties on the matter, the Commissioners informed both the Conference and Council, and the Government, at the conclusion of the hearing on February 14, 2000, that:

...the Commission feels that following this Hearing and having taken into consideration the reasons for which there was a decision by [the Government] to favour a referral on the comprehensive review of the pension plan or the annuity scheme and taking into consideration what we heard about some of the items that have been deleted from the list of proposals or submissions made by the Judiciary, we would like to ask [Counsel for the Government] if you could go back to your clients and discuss this further with them in order that we do everything possible to meet our requirements of dealing with the whole issue in view of Article 26 (1) When we look at the ...issues that are left on the table the Commission feels that they could deal with these issues within the mandate of 26 (1).¹²

At the public hearing on March 20, 2000, Counsel for the Government expanded the list of items that the Government felt could be dealt with in this report. However, it continued to be the Government's position that certain proposals -- particularly those relating to early retirement and, by implication, the "appropriate length of a judicial career" -- should be the subject of a comprehensive review, to be conducted after the presentation of this report.

There was clear agreement among all principal parties, however, that the Commission has jurisdiction to deal with all the proposals that have been raised in this inquiry. As Counsel for the Government commented on March 20:

...the Government accepts that the Commission has the jurisdiction to deal with all the issues of salary and pensions as a matter of jurisdiction. The Government has not made a referral and will not make a referral before seeing the Commission's report...

¹² *Ibid.*, at 301 to 302.

And the Government's argument is in the framework of what the Commission should do, not what it can do, but what the Commission should do in that respect.¹³

4.4 Our Approach to the Issues

The Commission carefully considered the positions advanced by the Conference and Council and by the Government. We had long and detailed consultations with experts whom we engaged. We believe that we are in position to deal fairly and responsibly with the issues that have been raised before us within the statutorily mandated time frame of our inquiry. Therefore, we recommend in the balance of this Chapter a number of changes to the annuity scheme for judges that in our view respond constructively and responsibly to the changing characteristics and needs of the Judiciary in a rapidly evolving society. Although our recommendations carry with them some increased costs, they are not aimed at further enriching the pension plan but, rather, are directed at providing additional flexibility and choice, which we believe are important to continue to attract the outstanding judicial candidates that the country requires.

Before discussing the specific recommendations, it is important to comment on the notion of what is an "appropriate judicial life span". The Government asserted that this issue is critical to the design of the annuity scheme, and is one where there should be deeper study than the Commission is in a position to conduct in the context of the current review. The Conference and Council submitted that the appropriate judicial life span is 15 years, although no studies supporting this position were provided. Rather, the proposition was founded upon the historical role that 15 years has played in the annuity scheme, particularly in the period between 1867 and 1919.¹⁴

The Commission recognizes the importance of this issue. On the basis of the information before us, we are unable to conclude that any change is required in the modified Rule of 80 that currently determines when judges become eligible for a full annuity. We believe it is nevertheless possible and appropriate to make recommendations for substantive, practical

¹³ Transcript of the March 20, 2000 Public Hearing, at 97.

¹⁴ *Ibid.*, at 35 to 36 and 80 to 81.

changes that will provide greater fairness and flexibility to judges' annuities. We believe that we can move a considerable distance toward the increased flexibility that characterizes most modern pension plans while maintaining the essential distinguishing characteristic of the judges' annuity: that is, the entitlement to a pension equal to 2/3 of final salary upon eligibility for retirement.

The balance of this Chapter outlines our reasoning and our recommendations.

4.5 Eligibility for Full Pension

The Conference and Council have proposed two modifications to the current rules. First, they propose that a judge be eligible for full pension after 15 years of service, although the pension would not be payable until the judge reaches age 60. This change, compared with the current regime, would benefit judges who are appointed at ages younger than 50. Second, they propose that the requirement that a judge serve at least 15 years, the requirement now attached to the current modified Rule of 80, be removed. This change would benefit judges who are appointed at ages older than 50. Table 4.1 compares the eligibility age for full pension, and the working years necessary to earn it, for judges appointed at different ages, under the current regime and that proposed by the Conference and Council.

We note that the Government took no substantive position on these proposals of the Conference and Council, since it argued that the requirements for eligibility for full pension should be subject to a subsequent, more detailed review.

Although the judges' annuity plan does not have an annual accrual rate, it is possible to calculate an implicit accrual rate. With 15 years of service required to earn an annuity equal to 2/3 of final salary, the implicit accrual rate is 4.4% of salary per year. An accrual rate that exceeds 4% is very unusual among pension plans in either the public or private sectors.¹⁵ The proposal of the Conference and Council for an unencumbered Rule of 80 would further benefit judges who are appointed in their 50s and 60s, making it possible to accrue a full annuity with as few as 6

¹⁵ For example, accrual rates for members of the House of Commons are 4% per annum. Some senior Deputy Ministers are entitled to accrue retirement income at a rate of 4% per annum for a maximum of ten years.

working years. We are not convinced that it is necessary or desirable to move to an unencumbered Rule of 80.

Table 4.1
Age of Eligibility For Full Pension
And Working Years Required To Earn It

Age at Appointment	Current Regime		Proposal by Conference and Council	
	Age at eligibility	Working years required	Age at eligibility	Working years required
38	59	21	53	15
40	60	20	55	15
42	61	19	57	15
44	62	18	59	15
46	63	17	61	15
48	64	16	63	15
50	65	15	65	15
52	67	15	66	14
54	69	15	67	13
56	71	15	68	12
58	73	15	69	11
60	75	15	70	10
62	75	13	71	9
64	75	11	72	8
66	75	9*	73	7
68	75	7**	74	6

*The retiring judge would receive 90% of a full annuity.

**The retiring judge would receive 70% of a full annuity.

As we indicated earlier, the Conference and Council, in arguing for a right to full annuity eligibility at 15 years, argued that the current system disadvantages younger judges appointed in their late 30s or 40s, many of whom are female. As can be seen from Table 4.1, a judge appointed at age 40 must work (and contribute) five years longer than a judge appointed at age 50 in order to receive an identical annuity. This is not a feature of most pension plans, where the amount of the annuity is related to years of service. The Commissioners engaged Professor Patrick Monahan, of Osgoode Hall Law School at York University, to examine whether this situation raised concerns under the *Charter*. Professor Monahan, in an opinion that is attached at

Appendix 7, concluded that there are three significant reasons why an equality rights challenge brought on this basis would be unlikely to succeed.

First, an incomplete picture is obtained if one looks only at the contributions and does not consider the benefit received for those contributions. It is true that a younger appointee contributes for a longer time, but it is also true that a younger appointee will retire at a younger age than an older appointee and can therefore be expected to receive the annuity for a longer period. Indeed, as set out in Professor Monahan's opinion, calculations provided by the Office of the Chief Actuary show that:

...the annuity available to an appointee at age 40 will have a present value of approximately \$5 million in the year 2020, which is significantly higher than the present value of the annuity available to the 50 year old appointee (\$3.64 million in the year 2015) or the 60 year old appointee (\$2.64 million in the year 2015). Even discounting for inflation between the years 2015 and 2020, the present value of the 40 year old's annuity is approximately 19 per cent higher than that of the 50 year old appointee, and 63 per cent higher than that of the 60 year old appointee. Female appointees are assumed to live longer than male appointees and thus the present value of their individual annuities (considered without regard to the value of a survivor's annuity) is uniformly higher for all age groups. However the life expectancies of survivors of male appointees are assumed to be longer, which has the effect of increasing in relative terms the present value of the total annuity attributable to male judges to a level which is broadly comparable to the value of the total annuity attributable to female judges. (at 2)

On this point, Professor Monahan concludes that "since younger appointees are entitled to receive an annuity with a present value that is far greater than older appointees, they cannot be said to be subject to unequal treatment." (at 3)

The second reason why Professor Monahan concludes that a challenge would be unlikely to succeed is that the age of judicial appointment is within the significant control of the appointee.

...if a potential candidate came to the view that the judicial annuity scheme is discriminatory towards younger appointees, he or she could avoid this discrimination by waiting to apply until a later date. On this basis, even if it were to be found that there was some form of inequality inherent in the judicial annuity scheme, it is arguable that the inequality

can be avoided by the conscious choice of candidates and thus cannot give rise to a successful equality rights claim. (at 3)

Third, Professor Monahan concludes that even if the scheme were found to impose some sort of unequal treatment, it *"nevertheless confers a significant economic benefit on judicial appointees of all ages. Therefore it is very unlikely that the judicial annuity scheme could be held to be discriminatory, within the definition elaborated by the Supreme Court of Canada"*. (at 3)

Professor Monahan's conclusions with regard to the *Charter* suggest to us that it is not legally necessary to change the current eligibility for retirement as reflected in the modified Rule of 80. The question remains, however, whether it is desirable to do so even though it may not be legally required.

We have considered carefully the proposal to allow eligibility for a full pension after 15 years. On the one hand, we recognize the role that 15 years of service has played historically. We also recognize that providing a full entitlement to 2/3 of salary after 15 years of service would be extraordinarily generous in comparison to other broadly based pension plans. On balance, we conclude that we do not have an adequate basis at this time to accept the proposal of the Conference and Council that judges be entitled to a full pension after 15 years of service.

There is an additional factor that we believe important in this connection. Although younger appointees do receive a greater annuity (in present value terms) than older appointees, they must serve a longer time to "earn" this pension. Because there are no early retirement provisions in the annuity scheme, they are effectively locked in to what can be a very long period of service to receive any benefit other than a return of their own contributions with interest. Shortening the eligibility requirement to 15 years is one way of addressing this concern. But another way is to provide more flexibility in the form of early retirement options. We recommend such options below. We believe that this additional flexibility will be helpful in encouraging younger candidates to apply, as well as providing additional retirement planning opportunities for those now serving as judges.

4.6 Cessation of Contributions

The Conference and Council proposed that contributions to the annuity scheme cease after 15 years of service, whether or not a judge is then eligible to retire. The Government submitted that contributions should be reduced from 7% to 1% of salary at the time that a judge becomes eligible for a full annuity.

The Commission also received submissions on this point from Mr. Justice Douglas Lambert, of the Court of Appeal for British Columbia and Court of Appeal for Yukon, who took the position that requiring contributions after a judge has effectively earned the right to retire with a full annuity is not only unfair, but is unlawful and unconstitutional.¹⁶

This issue was also considered by the Scott Commission (1996), which noted that *"the sum of the annual pension contributions of 7% made by judges to retirement are modest relative to the final costs borne by the Crown"*.¹⁷ On this basis, it agreed with the earlier conclusions of the Crawford Commission (1993), which supported the continuation of judges' contributions towards the cost of their pensions until those who are entitled to retire do so. The Scott Commission commented that any *"perception of inequitable treatment is surely tempered by the benefits afforded the annuitant under the present arrangement."*¹⁸

After hearing and considering the submissions of Justice Lambert and those of the Conference and Council and of the Government, we concluded that contributions toward the judges' annuity should not continue past the point where the judge is eligible to receive that annuity. Even though there is no concept of annual accrual, it would nevertheless be the case that additional contributions were being required in circumstances where no additional benefit was forthcoming. We have noted that this is not the case in employer-sponsored pension plans. We do recognize that the 7% contribution is made up of two components -- 6% on account of the pension and 1% as a contribution to the indexation of the pension in retirement. The pension plan for the federal public service requires that the 1% contribution continue even after the maximum pension has

¹⁶ Submission of Mr. Justice Lambert to the Commission dated December 6, 1999 and the Transcript of the March 20, 2000 Public Hearing, at 47 to 66.

¹⁷ Scott (1996), at 22.

¹⁸ *Ibid.*

been earned, so long as the individual continues in employment. We believe that this is also a reasonable situation for the Judiciary.

Recommendation 6

The Commission recommends that, effective as of April 1, 2000, contributions toward a judicial annuity be reduced from 7% of salary to 1% of salary for the period during which a judge is entitled to receive a full annuity but continues to work in either a full-time or supernumerary capacity.

4.7 Contributions to RRSPs

The Conference and Council requested the right to fully contribute to RRSPs after 15 years of service. There is no explicit link in the submission of the Conference and Council to the eligibility for retirement after 15 years and the cessation of contributions after 15 years, but there is a certain logic in linking the two proposals. Counsel for the Government pointed out that, for public service pensions, the RRSP limit is restored once contributions cease.¹⁹

The Commission sees no reason, either in policy or precedent, why contribution room to RRSPs should not be restored when judges cease making contributions to their annuity. We understand that this will not happen automatically, but will require amendment to Regulation 8309(2) of the *Income Tax Act*.

Recommendation 7

The Commission recommends that, effective as of April 1, 2000, the relevant regulations under the *Income Tax Act* be amended to afford judges the opportunity to contribute to RRSPs at the time they cease making contributions to the judicial annuity scheme, on the same basis as public servants are now allowed to do.

¹⁹ Transcript of the March 20, 2000 Public Hearing, at 15.

4.8 Supernumerary Status

The ability for judges to elect supernumerary status, under certain conditions, was introduced in 1971. The election to supernumerary status allows a judge who would otherwise be eligible for retirement, and an annuity equal to 2/3 of salary, to continue to work on a half-time basis for full salary. When the measure was introduced in 1971 the then Minister of Justice, testifying before the Standing Committee on Justice and Legal Affairs, explained the proposal in the following terms:

*The advantages of the proposition before you, Mr. Chairman, are that the judges will be induced to vacate their ordinary judicial office, will be able, thereby, to create a vacancy for younger appointments, and yet the supernumerary judges will be available at all times; it will provide a larger proportion of younger judges and yet at the same time retain a pool of capable experienced judges at the disposal of the chief justice.*²⁰

As a result of the 1971 changes, judges were afforded the opportunity to elect supernumerary status at age 70, with a minimum of 10 years on the Bench. Judges could serve in a supernumerary capacity for five years, until mandatory retirement at age 75.

In 1973, amendments were passed that permitted judges to elect supernumerary status at age 65, rather than 70, for a maximum period of 10 years, so long as the judge had served at least 15 years. This change linked the ability of judges to elect supernumerary status with the conditions at which they became eligible for a full annuity of 2/3 of salary. In 1998, conditions for eligibility for a full annuity were revised to incorporate the modified Rule of 80, which provided additional flexibility to younger judges in terms of their retirement options. But no corresponding changes were made to eligibility for supernumerary status. As a result, judges who are now eligible for a full annuity at ages younger than 65 years cannot opt for supernumerary status without continuing to serve for a further period as a full-time judge.

The submissions of the Conference and Council suggest that supernumerary status is not only cost neutral to the Government, but that it is a net benefit since a supernumerary judge effectively works half-time for 1/3 of his or her salary (that is, the difference between full salary

²⁰ Submission of the Government dated April 19, 2000, at 3 and at Appendix 53.

and what the judge would be entitled to as an annuity if he or she retired). The Crawford Commission (1993) accepted this analysis but went on to state that:

We would encourage chief justices to continue to carefully monitor the implementation of the supernumerary programme in their respective courts. We would invite the Canadian Judicial Council to consider documenting court management of the supernumerary programme so that it might confirm for future Triennial Commissions whether the basic assumptions surrounding supernumerary service, such as the 50% workload factor, remain valid in the years ahead as the number of supernumerary judges increases.²¹

To the best of our knowledge, such follow-up activities have not been undertaken. We reiterate the encouragement given by the Crawford Commission (1993) to the Council to actively collect relevant information in this area with a view to making it available for future quadrennial reviews.

We have considered the reasons why supernumerary status was introduced and our conclusions are that it was a useful response to both the backlog in judicial cases and the desire to renew the judiciary and make it more reflective of demographics in a changing Canadian society. We believe that both of these objectives suggest that there be no substantive change at this time in the basic concept of supernumerary status. We do find, however, that there is no logical basis for the gap between eligibility for a full annuity and the ability to elect supernumerary status that has opened up since the introduction of the modified Rule of 80. Therefore, we conclude that this gap should be closed.

Recommendation 8

The Commission recommends that, effective as of April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding 10 years upon attaining eligibility for a full pension.

²¹ Crawford (1993), at 25.

4.9 Early Retirement

At the present time judges are not allowed any early retirement benefits. A judge appointed at 40 years of age must serve 20 years to qualify for a full annuity. If he or she serves any time less than 20 years, the only compensation is return of the judges' contributions with interest. As we have seen, judges' contributions account for only a small portion of the value of the annuity and judges have been denied RRSP room for all of the time during which they are making contributions to the annuity program. This lack of any early retirement consideration strikes us as inflexible and unfair.

We believe that many of the alleged inequities in the annuity scheme would become substantially less difficult if judges could elect to retire with some pension benefits after a reasonable period of service. For example, a judge appointed at 40, who must now work 20 years to attain the same pension that an older judge can attain by working 15 years, might feel differently about the additional five years if he or she could also retire after 15 years, with some pension benefits, and pursue other professional or personal interests. Similarly, a judge who is appointed in his or her late 50s, and now must work until the early 70s to attain any judicial pension, could be less interested in an unencumbered Rule of 80 if it were possible to retire earlier with some pension benefits. We therefore believe that an early retirement option is of critical importance.

We also believe that an early retirement option is strongly suggested by the changing nature of the judiciary -- that is, by the demographic and gender characteristics of new appointees, and the increasingly complex and difficult nature of the judicial workload. In the modern world, pension arrangements ought not to act as "golden handcuffs" but should facilitate rational career planning on a fair and reasonable basis.

The Conference and Council have proposed that judges have the right to take early retirement at any age after 10 years of service, on a pro-rated annuity. Consistent with the view that the annuity should be fully earned after 15 years, the Conference and Council suggest that the pro-rated annuity should be payable at age 60 and should be calculated as $\frac{2}{3}$ of the salary that pertains at that time, times a fraction that would be equal to the actual number of years of service divided by 15. It further submits that a judge should be able to take the annuity immediately

upon retirement, in which case it would be calculated as $2/3$ of the final salary times the same fraction, reduced by 3% per year for every year in advance of age 60.

The Government made no submission on the issue of early retirement, arguing that this was one of the issues which turned upon the broader questions it wished to have explored in its suggested review of the entire annuity scheme. The submission of the Conference and Council suggested that one reason for proposing an early retirement scheme was to address the issue of burnout.²² In oral submissions before the Commission, Counsel for the Government argued that there is inadequate information about the extent to which burnout is a problem, and even if it is a serious problem, there are other methods that can be introduced to deal with it short of early retirement provisions.²³

As indicated above, the Commission does not rest its conclusions with regard to early retirement on the existence of burnout. In our view, the case for early retirement with some pension benefit is one of planning flexibility and fairness. It appears to us that the key issue is not whether to provide a benefit, but how it should be structured.

We regret that the Government did not put forward any views in this regard. We feel nonetheless that we have developed a model that is reasonable in the circumstances. There are a number of parameters that must be decided upon to develop an early retirement regime. These include:

- i) the threshold at which a judge would be entitled to elect early retirement;
- ii) the manner in which the pension should be calculated and pro-rated, and the date at which an unreduced pension could begin to flow to the retired judge; and
- iii) the actuarial penalty that should be imposed if the judge chooses to take an immediate pension at the time of early retirement.

²² Submission of the Conference and Council dated December 20, 1999, at 3-26.

²³ Transcript of the March 20, 2000 Public Hearing, at 33 to 35.

The Threshold for Early Retirement

We believe that those who would seek appointments to the Bench should do so with a view to serving a reasonable length of time and devoting a considerable portion of their career to this endeavour. We also note that it is the norm among most pension plans in both the private and public sectors, to set age 55 as a threshold for early retirement eligibility. We have concluded that this is an appropriate standard to apply at this time to the judges' pension plan.

Recommendation 9

The Commission recommends that, effective as of April 1, 2000, to be eligible for early retirement with a pro-rated pension, a judge must serve at least 10 years and must be at least 55 years of age.

Calculation of the Pension

A judge who is eligible for a pro-rated pension would have the pension calculated as 2/3 of salary at the time the election for early retirement is made, multiplied by a fraction calculated as the number of years of service divided by the number of years of service necessary for that judge to become eligible for a full pension. The denominator will vary by age of appointment, as shown in Table 4.1. For example:

- i) a judge appointed at age 38 and choosing early retirement at age 55 would receive 17/21 of his or her pension;
- ii) a judge appointed at age 44 and choosing early retirement at age 55 would receive 11/18 of his or her pension; and
- iii) a judge appointed at age 56 and retiring 10 years later at age 66 would receive 10/15 of his or her pension.

In each of these cases the pension would not be payable before age 60 but would be indexed by the Consumer Price Index in each of the years for which it was deferred.

Recommendation 10

The Commission recommends that, effective as of April 1, 2000, a pro-rated pension, available to any judge who has served at least 10 years and is at least 55 years of age, be calculated as $\frac{2}{3}$ of salary in the year that early retirement is elected, multiplied by the number of years of service divided by the number of years which the electing judge would have been required to serve in order to earn a full annuity.

Recommendation 11

The Commission recommends that, effective as of April 1, 2000, the pro-rated pension not be payable without actuarial reduction prior to the judge attaining age 60 and that the amount of the pension be indexed by the Consumer Price Index in each year that it is deferred.

Actuarial Penalty for Immediate Payment

Virtually all early retirement provisions allow the annuitant a choice between deferring the pro-rated pension until some later date, with no actuarial reduction, or taking an immediate pension that is reduced by an amount that, in principle, should be cost-neutral with respect to taking the pension earlier or later.

The Conference and Council asked for a reduction of 3% per year for each year in advance of age 60 that the annuitant receives the pro-rated pension. The information we have received from our experts suggests that early retirement penalties typically vary from 3% to 6% per year. A 6% penalty was the traditional, widely used penalty in the 1960s and 1970s but has often been reduced over the years. A 5% penalty is widely used now and is the rate that is applied in the federal public service pension plan, including senior Deputy Ministers. The 3% penalty rate is the minimum penalty rate that Canadian income tax rules permit in combination with generous formulas for the entitlement to an unreduced pension. It is widely used with executive pension plans when an important objective is to maximize the tax advantage provided under the *Income Tax Act*.

The cost of various penalties to the plan sponsor will depend upon the specific characteristics of each plan. In general, a 5% penalty will always cause some additional, but not necessarily significant, cost. A 3% penalty tends to cause significant cost increases because of the larger pension being paid and the greater inducement to early retirement that derives from a lower penalty. The cost will be proportional to the usage of the option, and the lower the penalty, the greater the expected use of the option will be.

Recommendation 12

Should a judge who is eligible for early retirement wish to elect a pro-rated annuity that is payable immediately, the Commission recommends that the value of the annuity be reduced by 5% per year for every year that the annuity is paid in advance of age 60.

Summary of Early Retirement Recommendations

Table 4.2 shows the increased retirement flexibility that these proposals provide to judges who are appointed at different ages. Under the current regime, a judge who retires before the earliest age of retirement (column 2) is entitled to only a return of his or her own contributions plus interest. Under the proposed recommendations, a judge appointed at 40, choosing to retire at 55 would have an annuity of 50% of salary if deferred to age 60 or 37.5% of salary if the annuity is taken at retirement.

Table 4.2
Early Retirement Options Under Recommended System

Age at appointment	Earliest age of retirement with full (2/3) annuity (identical for current and proposed systems)	Early retirement options under recommended system		
		Earliest age of retirement with pro-rated annuity	Pro-rated annuity as % of salary at time of early retirement, if deferred to age 60	Pro-rated annuity as % of salary at time of early retirement, if taken at retirement.
40	60	55	50%	37.5%
44	62	55	40.8%	30.6%
50	65	60	44.4%	44.4%
56	71	66	44.4%	44.4%
60	75	70	44.4%	44.4%
65	75	75	66.7%	66.7%

4.10 Survivor Benefits

The Conference and Council raised four concerns with regard to the structure and level of survivors' benefits. They proposed that:

- i) legislation be amended to bring the *Judges Act* into conformity with existing law and jurisprudence regarding the rights of survivors of common-law or same-sex relationships;
- ii) the annuity payable to a survivor should be increased from 33.3% to 40% of salary if the judge dies while in office, and from 50% to 60% of the judge's annuity if the judge dies while in receipt of an annuity;
- iii) a judge, at the time of retirement, should have the right to elect a higher survivor benefit for the lifetime of the survivor, with the initial pension being actuarially reduced to make such an election cost-neutral to the government; and
- iv) subsection 44(3) of the *Judges Act*, which limits to one the number of survivors' pensions that can be paid under the *Act*, should be repealed.

Bill C-23, which was introduced by the Government on February 11, 2000, responds to the first proposal of the Conference and Council with respect to common-law and same-sex relationships. The views of the Commission were sought with respect to this legislation. In a letter to the

Minister of Justice dated March 27, 2000 (at Appendix 8), the Commission endorsed the proposals to amend the *Judges Act* contained in Bill C-23.

With respect to the second proposal, the Conference and Council indicated that this was recommended by both the Guthrie Commission (1987) and the Courtois Commission (1990).²⁴ Both of those Commissions recommended that the benefit increase apply only to future deaths and not to existing survivors. Neither the Guthrie nor Courtois Commissions appear to have addressed the issue of who would pay for this benefit enhancement, suggesting by implication that it would be at Government expense. The Scott Commission (1996) also addressed the survivor benefit issue, noting that estimates that it received suggested that the cost of the reform would be "*in the neighbourhood of \$2 million over five years escalating accordingly thereafter*".²⁵ The Scott Commission chose to recommend no change in benefits because it felt that a salary increase was a higher priority.

The existing survivors' benefits in the judges' plan are identical to those available to federal public servants. Pension benefit standards legislation, which governs minimum acceptable standards for private sector pension plans, requires survivors' benefits of at least 60% of pension. In most plans that offer this benefit, the annuitant's pension is actuarially reduced to fund the higher level of benefit that is paid to survivors, with no net cost to the plan. This Commission supports increasing survivors' benefits but the question of who pays for this enhancement deserves consideration and comment.

The Government's estimated costing in accrued liabilities under the annuity scheme for the increase in survivors' benefits ranged from \$39.7 to \$49.6 million, depending upon which actuarial assumptions were employed in the calculation. The actual increase in annual costs was estimated at between \$2.8 and \$3.7 million per year.

The Commission also received information from Statistics Canada about the treatment of survivors' benefits in public and private pension plans. This information covers 6,901 registered pension plans with 4.45 million members. Of the total, 24.2% of all members belong to plans

²⁴ Guthrie (1987), at 19 and Courtois (1990), at 29.

²⁵ Scott (1996), at 24.

that provide only a survivors' benefit of 50% of the pension. An additional 53.5% of all members belong to plans that provide survivors' benefits equal to 60% of the annuity, but require a reduction of the initial benefit. Only 8.3% of all members have survivors' benefits of 60% with no reduction of the initial benefit.²⁶

We reiterate an important principle that we articulated at the beginning of this Chapter, namely, our overall concern in addressing the structure of the annuity scheme, which is relatively generous, is not to enrich the program further but to provide greater planning flexibility and choice to current and future judges.

Recommendation 13

The Commission recommends that, effective as of April 1, 2000, the annuity provisions of the *Judges Act* be amended to provide judges with the option to elect a survivor's benefit of 60% of the judicial annuity, with a consequent reduction in the initial benefit calculated to minimize any additional cost to the annuity plan.

The Conference and Council also requested the ability to elect survivors' benefits in excess of 60% on a cost neutral basis. In principle, we see no problem with this request as it appears to be a simple extension of the previous request. In practice, however, we have been cautioned that it is not strictly possible to make such elections on a cost-neutral basis because of the age at which judges retire. Indeed, Mr. Cornelis of the Office of the Chief Actuary has commented that "*true cost neutrality cannot be achieved*" and that the election is tantamount to giving a retired judge "*the right to buy insurance at a standard cost but without a medical examination*".²⁷ We conclude that some additional flexibility should be provided, but we believe that the extent of such flexibility should be limited to contain costs.

²⁶Statistics Canada, *Pension Plans in Canada*. Catalogue no. 74-401-SPB, January 1 1997, Table 18. The information was contained in the Submission of the Government dated March 31, 2000 at Appendix 43.

²⁷Submission of the Government dated January 21, 2000, at Appendix 29, at 8.

Recommendation 14

The Commission recommends that, effective as of April 1, 2000, judges have the further flexibility to elect a survivor's benefit of up to 75% of the annuitant's pension, with an actuarial reduction to initial benefits that will make the election as close to cost neutral as possible.

Finally, the Conference and Council requested that the limitation in the *Judges Act*, which prevents a survivor of more than one judge from collecting more than one survivor's benefit, be removed. The Commission sees no justifiable basis for continuance of this provision.

Recommendation 15

The Commission recommends that subsection 44(3) of the *Judges Act* be repealed.

4.11 Addressing the Impact of the Salary Freeze

As previously referred to in this report, the Government imposed a freeze on judges' salaries, by suspending automatic indexation from December of 1992 until March of 1997. This was implemented as part of a broader series of restraint measures contained in the *Public Sector Compensation Restraint Act* (Canada). The Scott Commission (1996) recommended that the Government introduce an appropriately phased upward adjustment in judicial salaries, beginning April 1, 1997, so as to ensure that the erosion of the salary base caused by the elimination of statutory indexing was effectively corrected.

During the period of the freeze, 131 judges retired. The Conference and Council submitted that the pensions of these retired judges (or, where applicable, their survivors) should be increased to reflect the "catch-up" in salary that was recommended by the Scott Commission. The Commission also received a submission from the Honourable Wallis Kempo who urged that judges who were actively working during the freeze period and then retired effective 1996 and onward, have been either forgotten or ignored. Madame Justice Kempo stated that these judges

have been denied not only compensation for the freeze years but, as well, reduced annuities as a consequence.²⁸

While the Government did implement the Scott Commission recommendations with regard to salary, it did not implement them retroactively. Indeed, the position of the Government is that the economic objectives that a wage freeze is intended to secure are at risk if those subject to the freeze have expectations that the impact of the wage freeze on incomes will be redressed subsequently. Counsel for the Government submitted that:

*...it has not been demonstrated that the freeze was unfair and needs to be redressed. The Scott Commission did not recommend a salary increase because the freeze was somehow unfair but because post-freeze salaries needed to be at a certain level.*²⁹

Counsel for the Government also noted that the pensions of public servants who retired during the freeze were similarly affected, with no offsetting measures.

The Commission recognizes that the freeze has had an adverse impact on some individual judges and their survivors. However, judges were not singled out as targets of wage restraint and the adverse impacts of the wage freeze were experienced by other Canadians as well. As a matter of principle, we do not accept that the adverse impact of the freeze should be redressed and we are not prepared to recommend the adjustment of pensions for those annuitants who retired during the freeze, or their survivors.

4.12 Special Retirement Provisions for Supreme Court Justices

Justices of the Supreme Court are permitted by law to participate in the deliberative process and judgment-writing on cases that they heard, for a period of up to six months after retirement. The Registrar of the Court, in a submission to the Commission, noted that:

It is in the best interests of the litigants and of the Court to have the complete Bench which heard an appeal make the decision. In particular,

²⁸ Letter from the Honourable Wallis Kempo dated December 20, 1999.

²⁹ Transcript of the March 20, 2000 Public Hearing, at 30.

*this avoids potential gridlock situations the Court could face with an even number of judges which could result in costly rehearings.*³⁰

The Registrar submitted that for this six-month period after retirement, Supreme Court Justices, with the certification of the Chief Justice, should be eligible for supernumerary status, and receive full salary, and an appropriately pro-rated portion of Incidental and Representational Allowances. We do not see the need to formally grant supernumerary status to Supreme Court Justices in this situation, but we do believe that they should receive full salary and pro-rated allowances for the period of time they are called upon to complete this work.

Recommendation 16

The Commission recommends that, effective as of April 1, 2000, a Justice of the Supreme Court of Canada who retires and who, with the certification of the Chief Justice is required to participate in judgments for up to six-months following retirement, be compensated at full salary (calculated at the time of retirement) for the time that he or she so serves, and be entitled to an appropriate portion of the Incidental and Representational Allowances.

4.13 Cost of Pension Proposals

We requested the Commission's experts to review our recommendations, together with the cost estimates of the requests of the Conference and Council that were prepared by the Office of the Chief Actuary and submitted to the Commission. We asked them, in light of this information, to provide their best estimates of the cost of the recommendations made in this Chapter. The detailed assumptions and results are provided at Appendix 9.

Overall, our recommendations concerning judicial annuities will decrease accrued liabilities by up to \$800,000 and will increase the annual cost of judicial pensions by \$2.23 to \$2.49 million. Virtually all of the annual cost increase, which has no impact on the accrued liabilities, is attributable to cessation of contributions at the time of eligibility for a full pension.

³⁰ Submission of the Registrar of the Supreme Court of Canada dated December 16, 1999, at 5 to 6.

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CHAPTER 5

OTHER BENEFITS

The Commission also received proposals for certain changes to current insurance and related benefits available to the Judiciary. These concerned:

- i) basic and supplementary life insurance benefits;
- ii) health benefits;
- iii) survivor benefits following death on duty; and
- iv) dental benefits.

5.1 Basic and Supplementary Life Insurance Benefits

At present, the Judiciary participates in insurance benefits available under the Public Service Management Insurance Plan (the "PSMIP"). Full-time Order-In-Council appointees and other senior public service executives (including Deputy Ministers) enjoy different benefits under an executive group life insurance plan (the "Executive Plan") available under the framework of the PSMIP. The Commission was informed that the Judiciary, for some time, has sought the benefits available under the Executive Plan. This was supported by the Scott Commission, which recommended that "*the government paid life insurance coverage for judges be brought more closely into line with that provided to Deputy Ministers*".¹

The basic life insurance benefits now available to the Judiciary provide a judge with coverage of one or two times salary, at the option and expense of the judge. Variable premiums apply, based on the age and gender of the participant in the plan.

¹ Scott (1996), at 28

In contrast, under the Executive Plan, basic insurance coverage of two times salary at no cost to the participants is provided. Similar benefits are available, without cost to the participants, to Members of Parliament and Senators under another plan. These separate plans have a single premium rate for life insurance based on the claims experience of the group as a whole. Under this structure, the actual premiums paid on behalf of an individual by the Government vary by salary level and are treated as a taxable benefit to the individual plan participant.

In submissions to this Commission, the Government recognized and supported the need to improve the life insurance available to the Judiciary, and indicated that it was prepared to fund the level of benefits equivalent to that available in the Executive Plan, so long as two concerns could be met. First, there should be no "cross-subsidization" within the PSMIP. For example, if the Judiciary were included in one of the existing plans under the PSIMP this would lead to higher premiums for each participant, thereby triggering increased taxable benefits. In effect, this would result in non-judicial plan participants subsidizing the participation of the Judiciary and, at the same time, receiving lower net insurance benefits. Second, the structure of the plan for the Judiciary should be such that the degree of cross-subsidization that would take place within the plan (between younger and older judges) would not result in a breach of section 15 of the *Charter*.

In this context, the Conference and Council suggested that a separate plan could be created for the Judiciary under the general rubric of the PSMIP, in order to avoid any cross-subsidization between members of the Judiciary and members of the Executive Plan.

Both the Conference and the Council, and the Government agreed that such a plan would provide to the judges benefits with respect to basic life insurance coverage, supplementary life insurance coverage, and post-retirement benefits that are, in all material respects, the same as those available to members of the Executive Plan.

The understanding of the Commission with regard to post-retirement benefits under the Executive Plan is that coverage would be available, at no cost to the insured, equivalent to 100% of final salary during the first year of retirement; 75% of salary during the second year; 50% of salary in the third year; and 25% thereafter for life.

Our understanding with regard to available supplementary benefits is that members of the Executive Plan, at their option and cost, and with suitable evidence of insurability, can purchase supplementary insurance up to 100% of annual salary.

Despite the willingness of both the Conference and Council, and the Government, to move in this direction, the proposed structure of the plan creates two separate issues, each related to the proposal of the Conference and Council that participation in the plan be compulsory for persons appointed to the Bench after introduction of the plan. The issues are:

- i) whether compulsory participation could result in a successful challenge under section 15 of the *Charter*; and
- ii) whether compulsory participation can be accommodated within the umbrella of the PSMIP.

The Conference and Council are strongly of the view that the economic sustainability of the plan, given the demographic profile of the Judiciary, depends upon compulsory participation in the plan of all judges following introduction of the plan. This is so because, over a certain age range for younger judges, the tax payable on the taxable benefit resulting from participation in the plan will likely exceed the actual cost at which insurance could be purchased in the market. If such judges opt out of the plan, this would raise premiums, raise taxable benefits, increase the range over which "opting-out" becomes attractive, and potentially threaten the viability of the plan. Compulsory participation, on the other hand, clearly results in cross-subsidization of older participants by younger participants.

In hearings before the Commission, the Conference and Council suggested that, upon creation of a separate plan, a one-time "opt-out" opportunity would be provided by which those persons who were judges at the time of introduction of the separate plan could elect whether to participate in the plan. Thereafter, following introduction of the plan, new judicial appointees would be required to participate in the plan or forego Government-paid basic life insurance benefits. Counsel for the Government expressed concern that limiting the ability to opt-out of the plan to those judges who are serving at the time the plan is introduced, and denying such ability to

judges who might be appointed subsequent to the introduction of the plan, could lead to a challenge under the *Charter*.²

In an effort to better understand the structure of the group insurance plans, and the concerns of the Conference and Council, and Government, we asked our expert advisors to convene a meeting of experts to explore some of the issues in more depth. We also requested the views of Professor Patrick Monahan, of Osgoode Hall Law School at York University, concerning the question of whether restricting an opt-out provision to those judges serving at the time of introduction of the plan could lead to a successful challenge under section 15 of the *Charter*.

Subsequent to the meeting of experts, and in response to a request to the Conference and Council for clarification of some points in their proposal, we were informed by letter that the opt-out proposal being requested by the Judiciary was an ability for a sitting judge, on a one-time basis at the inception of the plan, to exercise an option to either:

- i) opt out of the Government-paid basic life benefit; or
- ii) elect a lower basic life benefit of 100% of salary, rather than 200%³.

With respect to the potential *Charter* concerns, the Commission was informed by Professor Monahan that his preliminary examination of the issues suggested that an equality challenge to the plan proposed by the Conference and Council would not likely be successful.⁴

The second concern raised by the Government is that the current structure of the PSMIP does not provide for compulsory participation. In a letter to the Commission dated May 16, 2000, Counsel for the Government informed the Commissioners that:

The terms sought by the Conference and Council are incompatible with the PSMIP. Participation in the PSMIP is always optional: executives and parliamentarians have the choice of not participating. Compulsory

² Transcript of the February 14, 2000 Public Hearing, at 258 to 259.

³ Letter to Commission from Leigh D. Crestohl, dated April 28, 2000, at 1 to 2.

⁴ Memorandum from Patrick J. Monahan to Mr. Richard Drouin, dated April 28, 2000 and reproduced at Appendix 10 to this report. Professor Monahan's memorandum suggests that more detailed analysis of the situation would be appropriate in order to provide a more definitive opinion. The view of the Commission was that such further analysis was not necessary.

participation...would be inconsistent with the principles that groups may participate in the PSMIP only on the basis that they abide by the overall plan design as established for the public service population.⁵

In response to this letter the Commissioners sought and obtained confirmation from the parties that there was no disagreement between them about the benefits being sought; rather, the issues of concern related solely to the structure of the plan. An option was explored of legislating a stand-alone plan for the Judiciary outside the PSMIP, but such a stand-alone plan was subsequently rejected by the Conference and Council on the grounds that it would be economically prohibitive. In a letter to the Commission dated May 19, 2000, Counsel for the Conference and Council categorically rejected a solution outside the PSMIP. They strongly reiterated their rationale for requiring compulsory participation, but indicated that:

...should the Commission be of the opinion that the Judges cannot or should not be accommodated within the PSMIP, unless membership in the plan is voluntary, the Judges would rather forego insistence on compulsory membership in the plan than to find themselves thrust outside of the PSMIP.⁶

The Commission is satisfied that a separate plan within the PSMIP for the Judiciary is essential to obtain the economies necessary to make the group life insurance plan reasonable. We are further satisfied that there is a sound rationale for the structure of the plan proposed by the Conference and Council. On the basis of the advice received from Professor Monahan, we do not believe that this structure is likely to lead to a successful challenge under section 15 of the *Charter*. That leaves the issue of whether the framework of the PSMIP can be altered, as necessary, to accommodate the proposed structure of the judges' plan. We have heard suggestions that legislation might be required to do so, but we have not heard any evidence that the framework cannot be so modified.

⁵ Letter to Commission from David Sgayias, dated May 16, 2000.

⁶ Letter to Commission from L. Yves Fortier and Leigh D. Crestohl, dated May 19, 2000.

Recommendation 17

The Commission recommends that a separate plan, under the general framework of the PSMIP, be created promptly for the Judiciary so as to provide the Judiciary with basic life insurance, post-retirement life insurance, and supplementary life insurance benefits that are, in all material respects, the same as those now enjoyed by members of the Executive Plan.

Recommendation 18

The Commission recommends that incumbent judges, at the time of introduction of the new plan, have the option, at their sole discretion, of opting out of insurance coverage or electing to accept coverage of 100% of salary, rather than 200% of salary.

5.2 Health Benefits

Under the applicable current plan, the Judiciary is provided with Government-paid health insurance coverage, which provides 80% reimbursement of all eligible medical expenses subject to an annual deductible of \$25.00 for an individual and \$40.00 for a family. In connection with hospital benefits, judges currently have the option of upgrading hospital coverage from \$60.00 per day to \$150.00 per day, at their own expense. The Conference and Council proposed that the current hospital benefit of \$60.00 per day be upgraded to \$150.00 per day, at the cost of the Government, to accord with hospital benefits that the Judiciary understands are currently available to Deputy Ministers and OIC Executives.

The Commission was informed that effective April 1, 2000 the Government had entered into an agreement with relevant public service unions establishing a trust to manage the Public Service Health Care Plan. As part of this agreement, the Government undertook that no changes would be made to the plan prior to April 1, 2000 and that changes thereafter would be in the discretion of the trustees of the plan. Accordingly, while the Government was not opposed in principle to the request by the Conference and Council for Government-paid hospital coverage at the rate of \$150.00 per day, it cautioned that introduction of such an improved benefit ultimately was within the discretion of the trustees and not the control of the Government.

In these circumstances the Commission concludes that the Government should assume the cost of this additional benefit, and should take all available steps to urge the trustees to make the changes to the plan necessary to effect this result.

Recommendation 19

The Commission recommends that the Government take all available steps with the trustees of the applicable health benefits plan to effect a change under the plan to the hospital benefits available to the Judiciary, so as to increase such hospital benefits from \$60.00 per day to \$150.00 per day at no cost to judicial participants in the plan.

The Commission also received a submission from Madam Justice Alice Desjardins of the Federal Court of Appeal. Madam Justice Desjardins urged that single judges be allowed to register a close family member under the Public Service Health Care Plan, even if that family member was neither in a conjugal relationship with the judge nor a dependent. While sympathetic to the general principle raised by Madam Justice Desjardins, the Commission felt that a change of this nature would have such far-ranging implications for so many social programs that we were not able to recommend it.

5.3 Survivor Benefits Following Death On Duty

The Commission learned during the course of its inquiry that, at the present time, limited survivor benefits are available to the survivors of judges who die of unnatural causes during the course of the discharge by them of their public duties. This is to be contrasted with arrangements that apply for the surviving families of those senior public servants who regrettably suffer accidental or violent death as a result or during the course of the discharge by them of their public duties.

The Conference and Council requested that survivor benefits be made available to the families of judges who die by reason of, or in the performance of, their judicial duties, at the same level and under the same conditions as such benefits are made available to the survivors of Deputy

Ministers and other senior members of Government who die in like circumstances. The Government, in turn, informed the Commission that survivor benefits of this type are available for public servants but may not be available for Order-In-Council appointees. Apart from providing this clarification, the Government took no position on this request by the Conference and Council.

The Commission recognizes that in contemporary society members of the Judiciary, by virtue of the nature of their duties and the public aspect of their responsibilities, regrettably are exposed to increasing risk of personal, including fatal, injury. The frightening possibility of grave disabling or fatal injury occasioned by virtue of their status as judges is a possibility that can no longer responsibly be considered as entirely hypothetical. The Commission, therefore, strongly supports the proposition that the survivors of members of the Judiciary who die by reason of violence or through accident as a result or during the performance of their judicial duties, should receive survivor benefits at the maximum level and on the same basis as now provided for the most senior category of public servants for whom such benefits are currently provided.

Recommendation 20

The Commission recommends that, effective as of April 1, 2000, survivors of members of the Judiciary who die by accident or an act of violence occurring in the course of, or arising out of, the performance of their judicial duties should receive survivor benefits at the maximum level and on the same basis as now provided for the most senior category of public servants for whom such benefits are currently provided.

5.4 Dental Benefits

The Conference and Council requested that the Commission consider and recommend improvements to the dental plan benefits available to judges so as to provide benefits comparable to those provided under private sector dental plans. Further, the Commission was requested to recommend that coverage under the current dental plan available to judges be extended to retired judges. The dental coverage available to the Judiciary is identical to that currently provided to OIC Executives. The Government indicated that the dental plan is currently in the process of

being amended to provide coverage for retirees on an optional basis. The Government anticipated that retired judges would be eligible to participate in the dental plan, once so amended.

Although the Conference and Council provided some summary information to the Commission to compare the level of benefits under the public sector plan to those under certain private sector plans, the information, in our view, was not adequate to allow us to reach a determination with regard to the overall comparability of the public sector plan with the wide range of practices in the private sector. The Conference and Council were not specific in recommending particular changes to the current dental insurance arrangements. The Commissioners are aware that dental benefits under private sector plans are subject to considerable variation depending on the plan, the number of participants, the nature and extent of related benefits and the total compensation arrangements for plan participants. Accordingly, without specific details as to the nature of the improvements sought and identification of the type of private sector dental plan considered relevant by the Judiciary, we are not in a position to make any recommendation on this issue at this time.

With respect to the issue of inclusion of retired judges in the available dental plan, the Commission understands that the Government does not object to such inclusion so long as the necessary amendments are made to the current dental plan so as to permit the participation of such retirees, on the same terms and conditions as other retirees.

Recommendation 21

The Commission recommends that when the dental plan is amended to provide coverage to retirees, retired judges be eligible to participate on the same terms and conditions as other retirees.

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CHAPTER 6

FUNDING OF REPRESENTATIONAL COSTS OF JUDGES

In their initial submissions, the Conference and Council requested a decision by the Commission authorizing reimbursement by the Government of all costs incurred by the Conference and Council concerning their participation in the process of the Commission, payable in a manner analogous to a solicitor and client award of costs in a court proceeding. This scale of costs contemplates full reimbursement of all actual and proper expenditures, including fees and out-of-pocket disbursements for legal counsel and experts, inclusive of applicable taxes.

The Government argued that the Commission lacks jurisdiction both to order that the Government provide such funding to the Conference and Council and, further, to determine questions of law, including the question of whether the Government has any legal obligation to fund the participation of the Conference and Council before the Commission. It was argued, in any event, that the Government had no obligation to fund the participation of the Conference and Council, particularly where participation of the Judiciary, while desirable, was not required.

When the Commission met in public session on March 20, 2000 the respective positions of the involved parties on the funding issue were further clarified. It emerged that there was no dispute among the parties on the following:

- i) while the Commission does not have jurisdiction to direct or require that representational funding be provided by the Government to the Conference and Council, the Commission could make a recommendation to the Minister of Justice in that regard; and
- ii) the Government had contributed \$80,000 to the costs incurred by the Conference and Council in respect of their participation before the Commission. This payment was described by the Government as an "*ex gratia*" payment.

6.1 The Jurisdictional Question

As noted, all involved parties were agreed that there was no impediment to the Commission making a recommendation to the Minister of Justice on the matter of funding the representational costs of the Conference and Council, should the Commission conclude that such a recommendation was warranted. The making of such a recommendation, of course, is quite different from directing that reimbursement of representational costs be made by the Government. In either event, the Commission recognizes that consent of the parties cannot confer jurisdiction on the Commission if such jurisdiction does not otherwise legally exist.

The ability of an advisory tribunal to make a recommendation to government that reimbursement be made by the state of the representational costs of persons appearing before the tribunal, was clearly recognized in *Jones et al. v. RCMP Public Complaints Commission*.¹ In that case, the RCMP Public Complaints Commission declined to order the payment of funds to student complainants to allow them to be represented by counsel at an inquiry to be conducted by that tribunal. In addition, however, the tribunal concluded that it lacked jurisdiction to recommend to the federal government that such funding be provided and, accordingly, it declined to do so. On judicial review before the courts, the tribunal's decision was set aside and a declaration was granted that the tribunal had the authority to make the requested recommendation concerning funding, although there was no duty on it to do so. Rather, the decision whether to make such a recommendation was a matter within the complete discretion of the tribunal, as was the manner in which any such recommendation for funding might be made.

We are satisfied that similar reasoning applies to this Commission such that we are not precluded from making a funding recommendation if we determine that such a recommendation is advisable in the circumstances.

¹ (1998), 154 F.T.R. 184 (Federal Court of Canada, Trial Division).

6.2 Whether Provision of Funding is Obligatory

As noted, the Government asserted that there is no legal obligation, constitutional or otherwise, to fund the participation of the Conference and Council before the Commission. It also argued that the Commission lacks jurisdiction to determine whether an obligation to provide funding exists and, if so, on what basis, because such a determination involves a question of law and the determination of questions of law is beyond our legal authority.

In contrast, the Conference and Council argued that an obligation to provide representational funding to the Judiciary does exist and the entire issue of representational funding should be expressly recognized and dealt with by the Commission in its report.

We agree that it is important that we deal with the matter of representational funding in our report. For the reasons set out below, however, it is unnecessary for us to express a view on whether there is an affirmative legal obligation on the Government to provide representational funding to the Judiciary for the purposes of inquiries contemplated by section 26 of the *Judges Act* and further, on whether this Commission has the legal authority to determine such a question. We have concluded that some reimbursement of representational costs is both desirable and necessary to ensure the efficacy of the Commission's proceedings. Our recommendations in this regard are not dependent on any determination of whether an obligation to provide such funding exists in law.

6.3 The Desirability of Participation: A Threshold Consideration

Much has been said in the submissions of the involved parties concerning the desirability of, or necessity for, participation by the Judiciary in the quadrennial review process. This issue goes to the heart of the Commission's process and its ability to discharge its obligations under the *Judges Act*. We agree with the following observation by Madam Justice Reed in *Jones et al. v. RCMP Public Complaints Commission*, made by her in the context of determining whether authority existed to make a recommendation that funding be provided:

The consideration that I would think would be crucial for the Commission is whether legal representation of the complainants would improve the quality of the proceedings before it. My observation is that when decision-makers have before them one party who is represented by conscientious, experienced and highly competent counsel, [as applied in that case], they prefer that the opposite party be on a similar footing. They prefer that one party not be unrepresented. An equality in representation usually makes for easier and better decision-making.²

In the *PEI Reference Case*, Chief Justice Lamer stressed that recommendations by independent compensation commissions on judges' remuneration must be made with reference to objective criteria, not political expediencies. For this reason, he indicated that, although not required as a matter of constitutional law, such a commission's "*objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations. This can be best achieved by requiring that the commission receive and consider submissions from the judiciary, the executive, and the legislature...*".³ There is no requirement under the *Judges Act*, as amended to date, that we receive and consider submissions from each of the Judiciary, the executive and the legislature. Nonetheless, there can be no doubt that the proceedings of this Commission have been materially improved by the fact of active participation by both the Conference and Council, and Government. The participation of members of the Judiciary and Government has directly contributed to our understanding of the issues and has improved the information base available to us for our deliberations. This is consistent with the spirit and direction of the Supreme Court of Canada's decision in the *PEI Reference Case*.

We also have had regard to the decision of Mr. Justice Roberts of the Newfoundland Supreme Court in *Newfoundland Association of Provincial Court Judges v. Newfoundland*.⁴ In that case, in ordering funding for the judges of the Provincial Court of Newfoundland before either a compensation tribunal or the courts should that become necessary, Mr. Justice Roberts stated:

Constitutionally, our political system is composed of three branches of government -- executive, legislative and judicial. The importance of the independence of the judicial branch from the other two branches has already been canvassed. Despite this independence, judges are paid from public funds controlled by the executive and/or the legislature.

² *Ibid.*, at 191, para. 25.

³ *Supra*, Chapter 1, fn. 4, at para. 173.

⁴ (1998) 160 D.L.R. (4th) 337 (Nfld. S.C.).

That is why, as Lamer, C.J.C. has stated, the process of determining compensation for judges must be depoliticized. The independent tribunal or commission envisaged by the Supreme Court of Canada in the Provincial Court Judges Case [the PEI Reference Case], a version of which has existed in Newfoundland since 1992, permits the necessary dialectic at one step removed from the judges themselves. That dialectic is critical to arriving at the synthesis which will be a fair and adequate remuneration, while at the same time preserving judicial independence, both in perception and substance. For this dialectic to function, the judges have to be represented before the independent commission and/or the courts, if necessary, in the same way as the executive and/or the legislature must be represented. Is it right and just, then, that the executive and/or legislative branches of government be represented by persons whose services are paid for out of the public purse while those who represent the judicial branch are not? I think not. ...

...

For the system to work as envisaged, equity dictates that both parties to the process be funded, not just one.⁵

It seems clear to us that it is highly desirable that members of the Judiciary participate fully in the process of this Commission. For the purposes of this quadrennial review, they have done so chiefly through the involvement of the Conference and Council. Were the Judiciary not to be engaged in this Commission's process it could call into question both the efficacy of our proceedings and the objectivity of our recommendations. There is a strong argument to be made, therefore, that their participation is a necessary precondition if the process of this Commission is to be effective and objective, as required by the *PEI Reference Case*.

In any event, as a practical matter, without the participation of the Judiciary and the benefit of their submissions in addition to those of the Government and other interested persons, we are not confident that we would have gained sufficient understanding of the scope and potential impact of all of the issues raised before us.

That does not resolve the question, however, as to whether participation of the Judiciary must be funded participation. In our view, consideration of this aspect of the matter gives rise to at least the following issues:

⁵ *Ibid.*, at paras. 69 and 70.

- i) whether the decision-making process of the Commission would be improved by participation of the Judiciary and, if so, whether such participation could be assured in the absence of funding;
- ii) whether the participation of the Judiciary is connected to the Commission's ability to carry out an independent, effective and objective process for the determination of judicial remuneration;
- iii) whether, absent a recommendation from the Commission, public funding would otherwise be available to the Judiciary for participation in the Commission's process;
- iv) whether both the reality and appearance of fairness in relation to the Commission's process would be affected if public funding of the Judiciary's participation is not assured;
- v) whether the Government has elected to contribute to the representational costs of the Judiciary, by *ex gratia* payment or otherwise and, if so, whether the amount(s) of such contribution(s) is adequate in the circumstances;
- vi) in relation to disbursements incurred by the Judiciary for the cost of experts, whether the work performed by the experts was not otherwise available and whether, once undertaken, it was made available to all interested parties; and
- vii) whether the amount of representational costs was reasonable in the circumstances.

6.4 Analysis of Relevant Factors

As determined by the *PEI Reference Case*, the existence of this Commission and the special process envisaged by the *Judges Act* for its inquiries, are constitutionally mandated. The process of the Commission is specifically designed to establish an independent, effective and objective means for the determination of judicial remuneration in consequence of the constitutional prohibition precluding judges from negotiating their remuneration directly with representatives of the executive or the legislature.

Under this construct, while neither the Government nor the Judiciary is expressly deemed by statute to be a party to the Commission's proceedings, in practical terms they are the two principal actors before the Commission. In addition, although the *Judges Act* does not specifically require the participation of the Judiciary in the proceedings of the Commission, the

Act does expressly contemplate the involvement of the Judiciary at key stages of the process. Thus, for example, the involvement of the Judiciary is necessary under subsection 26.1(1) of the *Judges Act* in the nomination process which serves as the means by which the Commission is constituted. Similarly, under subsection 26(3) of the *Judges Act*, the Judiciary must be involved if the Commission seeks to postpone the date of commencement of its inquiry under subsection 26(1). These two features of the *Act* provide evidence of a legislative intention that the Judiciary be engaged in the special process required by the *PEI Reference Case* for the determination of judicial remuneration.

In *R. v. Campbell et al.*⁶ the Supreme Court of Canada was asked to provide directions on whether the Province of Alberta was required to pay the reasonable expenses of the Alberta judiciary incurred in participating in Alberta's provincial remuneration commission process, or litigation relating thereto. In a unanimous decision, the Court held:

*The composition and the procedure established for hearings before the independent, effective and objective commissions may vary widely. So will the approach to the payment of the representational costs of the judges. In some instances the resolution of the payment of representational costs will be achieved by agreement. Often the commission will have to determine the issue subject to an appeal to the court. In those circumstances the position adopted in the reasons of Roberts J. in Newfoundland Assn. of Provincial Court Judges, supra, may be appropriate, a matter upon which we need not comment in this motion. Suffice it to say, whatever may be the approach to the payment of costs it should be fair, equitable and reasonable.*⁷

As appears from this passage, the Supreme Court of Canada specifically had regard in *R. v. Campbell et al.* to the earlier decision of Mr. Justice Roberts in *Newfoundland Association of Provincial Court Judges v. Newfoundland*. In the latter case, as earlier noted, Mr. Justice Roberts concluded that judges have to be represented before independent compensation commissions if the depoliticized process intended for such commissions is to function properly. In consequence, he held on equitable principles that both parties to the process must be funded. The Supreme Court of Canada, in *R. v. Campbell et al.*, expressly refrained from commenting on

⁶ (1998), 169 D.L.R. (4th) 231.

⁷ *Ibid.*, at 233, para. 5.

the notion that funding was obligatory. The Court did not hold, although it left open the future possibility of holding, that the payment by government of the representational costs of judges in respect of participation before remuneration commissions is required at law, either in consequence of constitutional principles or in the interests of equity and fairness. What the Court did establish, however, is that the approach to the payment of representational costs of judges must be fair, equitable and reasonable.

In this case, both the Government and the Judiciary were represented throughout the Commission's process by able and experienced counsel. In the case of the Government, all of its representational costs were paid from public funds. In addition, the Government had available to it, also at public expense, the services of a variety of government experts, as required or thought desirable by the Government. In contrast, the Commission has been informed that the representational costs of the Judiciary have been paid for in equal shares to date by the Council and Conference, save as offset by the \$80,000 *ex gratia* payment made by the Government.

The Council is a statutory body under the *Judges Act* and is generally funded by Parliament through the Commissioner for Federal Judicial Affairs based on Parliamentary appropriations. The Commission is not aware of whether the budget of the Council was increased specifically to compensate the Council for its anticipated expenditures in relation to this Commission's inquiry.

In contrast, the Conference receives no public funding and is financed solely by its members. The Commission has been informed that there are 950 members of the Conference, at present, which represents approximately 94% of the Judiciary. Membership statistics vary from year to year and, in the past, have been as low as 850. The current annual membership fee is \$300, increased in 1999 from the previous amount of \$150 to take into account the costs of establishment of a permanent office for the Conference and the engagement of staff for that office, and in contemplation of this quadrennial review process. The Conference's objects extend beyond representation of its members before this or similar commissions. The Conference was founded before the establishment of the triennial review process. Its activities include, where appropriate, involvement in the process of compensation commissions relating to the Judiciary, as well as the determination of policy for the continuing education of judges,

among other matters. From time to time the Conference engages the services of outside counsel and other professionals to advise on issues unrelated to the quadrennial review process.⁸

The Commission was informed that the \$80,000 *ex gratia* payment received from the Government was made on account of the representational costs of both the Conference and Council and, upon receipt, was applied in full against outstanding invoices rendered by legal counsel for the Conference and Council.⁹

The Judiciary has not always been represented by legal counsel before past remuneration commissions. In our view, the participation of the Judiciary in the process of this Commission is as important and as beneficial as is the participation of the Government. As noted above, the quality of the Commission's decision-making and the efficacy of its process have been enhanced by the participation of both the Judiciary and Government. We are concerned, therefore, to ensure that no avoidable financial barriers to the future participation of the Judiciary before this inquiry, however constituted, are created. We also wish to ensure that public funds are expended only as necessary to defray the representational costs of the Judiciary.

We are generally of the view that the burden of paying the representational costs of the Judiciary attributable to participation in this quadrennial review process, should not be borne by individual judges. However, one of the stated reasons for recently increasing the annual membership fee for members of the Conference was associated with the costs to be incurred by the Conference through participation in the process of this inquiry. Accordingly, those members of the Conference who paid the increased annual membership fee presumably did so on the express understanding that a portion of that fee would be utilized to pay costs associated with participation in the quadrennial review. This factor must be taken into account.

Finally, we do not believe that the participation of the Judiciary should be dependent on the goodwill of the government of the day in authorizing *ex gratia* payments. If this were the case, the independence of the Judiciary from government would be undermined and the participation of the Judiciary in commission proceedings would be rendered uncertain.

⁸ Letter from Ogilvy Renault to the Commission, dated April 14, 2000, at 4.

⁹ *Ibid.*, at 3.

6.5 Conclusions and Recommendations

The Conference and Council provided us with a full breakdown of their representational costs as of the end of April, 2000, inclusive of legal fees and disbursements, and costs associated with experts. These costs were approximately \$270,000.00. We reviewed that breakdown and all related particulars in detail and concluded, for the purposes of our inquiry, that the costs incurred were reasonable.

We recognized that the costs of participating in the process of this inquiry were considerable. They included costs related to participation in the public hearings, the preparation of various written submissions and responding to inquiries by the Commission for additional information. The question is not whether such costs can be paid by the judges who belong to the Conference and Council but, rather, what proportion of these costs fairly and equitably should be borne by the Conference and Council or their members. We agree with the proposition recognized by Mr. Justice Roberts in *Newfoundland Association of Provincial Court Judges v. Newfoundland*, previously referenced, that it is neither right nor just that the executive and/or legislative branches of government be represented before a compensation commission by persons and experts whose services are paid for out of the public purse, while those who represent the judicial branch are not. On the other hand, we also believe that some contribution should be made by the Judiciary to their overall representational costs, through application of a portion of their membership fees in the Conference. Finally, we were conscious that any recommendation by us concerning payment of representational costs will apply only to this quadrennial review, and that future commissioners will be free to determine the issue as they think fit, having regard to the facts and circumstances applicable to their inquiries.

On the basis of all of the information available to us, the factors outlined above, and the circumstances which applied to the conduct of this quadrennial review, we concluded that the Government should be responsible for payment of 80% of the total representational costs incurred by the Conference and Council in respect of their participation in the process of this inquiry, as detailed for our consideration.

Recommendation 22

The Commission recommends that the Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payment by the Government not to exceed the aggregate amount of \$230,000, inclusive of the amount of \$80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budget of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.

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CHAPTER 7

REFLECTIONS ON PROCESS

Because this inquiry is the first to be conducted in response to the decision of the Supreme Court of Canada in the *PEI Reference Case*, we have spent considerable time in our own deliberations focusing on issues of process. There are no "hard and fast rules" for how the inquiry we have conducted should be undertaken. Successor Commissioners will develop their own procedures and any procedures we have adopted, while possibly helpful, are not binding as precedents. We believe, nonetheless, that it may assist successor Commissioners if we record the way in which we dealt with many of the process and procedural issues we considered. This Chapter does that, and also puts forward some suggestions as to how the process might be improved in future.

7.1 Relations with the Parties

Although the mandate and authority of this Commission is found in section 26 of the *Judges Act*, the Commission is also rooted in the constitutional framework that assures the independence of the Judiciary and the determination of the remuneration of the Judiciary by Parliament, and in the interpretation of that framework enunciated by Chief Justice Lamer in the *PEI Reference Case*. Among the consequences that flow from this is the recognition that the Government must respond promptly to the recommendations of the Commission, and that the Government must be prepared to justify, if necessary in a court of law, any decision not to implement the Commission's recommendations:

What judicial independence requires is that the executive or the legislature, whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to the contents of the commission's report within a specified period of time. ...

Furthermore, if after turning its mind to the report of the commission, the executive or the legislature, as applicable, chooses not to accept one or more of the recommendations in that report, it must be prepared to justify this decision, if necessary in a court of law. ... An unjustified decision could potentially lead to a finding of unconstitutionality.¹

This obligation on the Government to respond and justify its decision has altered the relationship of the Government to this Commission compared to its relationship with past Triennial Commissions. For example, we understand that this is the first Commission on judges' salaries and benefits where the Government has chosen to be represented throughout by counsel. This has tended to make the process and the work of the Commission somewhat more formal compared to the way in which we understand the previous Triennial Commissions to have functioned.

In considering our process, we reached the following conclusions:

- i) the Commissioners should have no direct contact with either the Judiciary or the Government on any matter before the Commission, other than through counsel to the parties. When we made requests to either the Government or the Judiciary, we ensured that the other party was made aware of the request, and, in cases where third parties had expressed a particular interest in the issue that concerned us, we endeavoured to ensure that they were also made aware of such requests;
- ii) since the *Judges Act* mandates us to submit our report to the Minister of Justice, it places the Commission in the position where, by statute, we are required to submit our report to a representative of one of the parties in proceedings before us. We concluded that fairness required that we make our report available to all parties at the same time, to the extent that logistics would allow;
- iii) our Commission decided that we should be as open and informal as possible. Our web site provided an opportunity to ensure that all parties, and other interested persons, could follow the submissions and arguments made to the Commission, and could contact us easily by e-mail if they wished to make comments. We provided three opportunities for written submissions: an original submission, a reply submission and a final submission. This process seems to have worked well; and
- iv) we endeavored to make our public hearings as informal as possible. Counsel representing parties submitted that formal rules of evidence did not apply

¹ *Supra*, Chapter 1, fn. 4, at paras. 179 to 180.

and we agreed. We structured our hearings in a way that would maximize information exchange, rather than the reiteration of formal positions that had already been made in written submissions. We also allowed questions of clarification of any party by all parties in attendance at the public hearing. Again, we believe that this process served the Commission and the parties well.

7.2 Organizational and Administrative Issues

In the early days of this Commission we received valuable administrative and logistical support from the Commissioner for Federal Judicial Affairs and his staff. We established our own offices that are associated with those of the Commissioner in order to achieve economies, but function independently. We suggest that the Commission, as a permanent entity separate from the Government and the Judiciary, should maintain its own offices and its own files. These should be physically separate from and independent of the Office of the Commissioner for Federal Judicial Affairs, although we believe that it is helpful and efficient to maintain close administrative ties with that office.

With regard to composition and staffing, we urge the Judiciary and the Government to nominate their representatives on the Commission in future in a time frame that will allow the Commission to be constituted and fully ready to function as of the September 1 date at which the quadrennial inquiry must be commenced. Nine months in which to conduct an inquiry of this scope and importance is not a long time.

In considering the timing of nominations, note must be taken of the manner in which the Commission is constituted. Each of the Judiciary and the Government nominates a Commissioner and the two nominees are charged with identifying and recruiting a Chair. In the case of this Commission, the nominees did not seek and were not provided with any assistance from the parties with regard to potential chairs of the Commission. We believe that the timelines around the appointments of the nominees were such that we were indeed fortunate to be able to commence our work, as required, in early September 1999. It took many additional weeks to recruit staff and put in place the necessary logistical and support measures that allowed us to function effectively. We believe that it is desirable for the next

Commissioners, whose inquiry will commence on September 1, 2003, to be appointed well in advance of that date, so that staffing and logistical arrangements can be made and a fully functioning Commission can have nine full months to complete the mandate that is set out for it in the *Judges Act*.

7.3 The Role of Experts and Research

We benefited greatly from the advice that we obtained from experts who examined difficult compensation, constitutional and other legal issues for us. We suggest that future Commissioners may wish to consider engaging such experts early in their inquiry.

One area where we felt the process might be improved concerned the matter of research. Our initial view was that the Commission might play a helpful role in working with the Judiciary and Government to identify an agreed research agenda, and that we might then contract such research on behalf of the parties and the Commission. In the event, this idea became a casualty of our not being fully staffed and ready to commence an in-depth review of the issues as of September 1. We simply had too many other administrative and logistical issues to deal with first. We continue to believe that it is a concept that makes good sense and one worthy of pursuit by future Commissioners. There are several benefits: increased understanding of the issues considered relevant by each party; economic use of research resources; and, hopefully, an accepted data base that would be common to the Commission, the Judiciary and Government.

As we indicated in Chapter 2, our deliberations on salary levels were informed by considerable information provided to us by both the Conference and Council, and Government. However, we did not have full or current information on the incomes of lawyers in private practice, the group that is likely to continue to yield most of the outstanding candidates for appointment to the Bench. Information from tax returns, provided to us by the Conference and Council, was a helpful proxy. We believe, however, that the Commission should develop, as best it can, a relevant income measure for lawyers in private practice that would allow it to track over time, in

a consistent way, the relationship between judges' compensation and a compensation measure for the private bar.

We believe that the Commission should be resourced to conduct a survey of private practitioner incomes on a regular basis.

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CHAPTER 8

RECOMMENDATIONS

The Commission recommends that:

Recommendation 1

The salary of puisne judges be established as follows:

Effective April 1, 2000: \$198,000, inclusive of statutory indexing effective that date;

Effective April 1, 2001: \$200,000, plus statutory indexing effective that date;

Effective April 1, 2002 and 2003, respectively: the salary of puisne judges should be increased by an additional \$2,000 in each year, plus statutory indexing effective on each of those dates.

(Section 2.4)

Recommendation 2

The salaries of the Justices of the Supreme Court of Canada, and the Chief Justices and Associate Chief Justices should be set, as of April 1, 2000 and inclusive of statutory indexing effective that date, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	\$254,500
Justices	\$235,700
Federal Court and Tax Court:	
Chief Justices	\$217,100
Associate Chief Justices	\$217,100
Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	\$217,100
Associate Chief Justices	\$217,100

As of April 1 in each of 2001, 2002 and 2003, these salaries should be adjusted to maintain the same proportionate relationship with the salary of puisne judges established as of April 1, 2000.

(Section 2.6)

Recommendation 3

Incidental Allowances be adjusted to a level of \$5,000 per year effective as of April 1, 2000.

(Section 3.1)

Recommendation 4

Northern Allowances be adjusted to a level of \$12,000 per year effective as of April 1, 2000.

(Section 3.2)

Recommendation 5

Effective as of April 1, 2000, Representational Allowances be set as follows:

Chief Justice of Canada	\$18,750
Chief Justices of the Federal Court of Canada and the Chief Justice of each province	\$ 12,500
Supreme Court of Canada Puisne Judges, Trial Chief Justices, Other Designated Chief Justices and Senior Judges	\$ 10,000

(Section 3.3)

Recommendation 6

Effective as of April 1, 2000, contributions toward a judicial annuity be reduced from 7% of salary to 1% of salary for the period during which a judge is entitled to receive a full annuity but continues to work in either a full-time or supernumerary capacity.

(Section 4.6)

Recommendation 7

Effective as of April 1, 2000, the relevant regulations under the *Income Tax Act* be amended to afford judges the opportunity to contribute to RRSPs at the time they

cease making contributions to the judicial annuity scheme, on the same basis as public servants are now allowed to do.

(Section 4.7)

Recommendation 8

Effective as of April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding 10 years upon attaining eligibility for a full pension.

(Section 4.8)

Recommendation 9

Effective as of April 1, 2000, to be eligible for early retirement with a pro-rated pension, a judge must serve at least 10 years and must be at least 55 years of age.

(Section 4.9)

Recommendation 10

Effective as of April 1, 2000, a pro-rated pension, available to any judge who has served at least 10 years and is at least 55 years of age, be calculated as $\frac{2}{3}$ of salary in the year that early retirement is elected, multiplied by the number of years of service divided by the number of years which the electing judge would have been required to serve in order to earn a full annuity.

(Section 4.9)

Recommendation 11

Effective as of April 1, 2000, the pro-rated pension not be payable without actuarial reduction prior to the judge attaining age 60 and that the amount of the pension be indexed by the Consumer Price Index in each year that it is deferred.

(Section 4.9)

Recommendation 12

Should a judge who is eligible for early retirement wish to elect a pro-rated annuity that is payable immediately, the value of the annuity be reduced by 5% per year for every year that the annuity is paid in advance of age 60.

(Section 4.9)

Recommendation 13

Effective as of April 1, 2000, the annuity provisions of the *Judges Act* be amended to provide judges with the option to elect a survivor's benefit of 60% of the judicial annuity, with a consequent reduction in the initial benefit calculated to minimize any additional cost to the annuity plan.

(Section 4.10)

Recommendation 14

Effective as of April 1, 2000, judges have the further flexibility to elect a survivor's benefit of up to 75% of the annuitant's pension, with an actuarial reduction to initial benefits that will make the election as close to cost neutral as possible.

(Section 4.10)

Recommendation 15

Subsection 44(3) of the *Judges Act* be repealed.

(Section 4.10)

Recommendation 16

Effective as of April 1, 2000, a Justice of the Supreme Court of Canada who retires and who, with the certification of the Chief Justice is required to participate in judgments for up to six-months following retirement, be compensated at full salary (calculated at the time of retirement) for the time that he or she so serves, and be entitled to an appropriate portion of the Incidental and Representational Allowances.

(Section 4.12)

Recommendation 17

A separate plan, under the general framework of the PSMIP, be created promptly for the Judiciary so as to provide the Judiciary with basic life insurance, post-retirement life insurance, and supplementary life insurance benefits that are, in all material respects, the same as those now enjoyed by members of the Executive Plan.

(Section 5.1)

Recommendation 18

Incumbent judges, at the time of introduction of the new plan, have the option, at their sole discretion, of opting out of insurance coverage or electing to accept coverage of 100% of salary, rather than 200% of salary.

(Section 5.1)

Recommendation 19

The Government take all available steps with the trustees of the applicable health benefits plan to effect a change under the plan to the hospital benefits available to the Judiciary, so as to increase such hospital benefits from \$60.00 per day to \$150.00 per day at no cost to judicial participants in the plan.

(Section 5.2)

Recommendation 20

Effective as of April 1, 2000, survivors of members of the Judiciary who die by accident or an act of violence occurring in the course of, or arising out of, the performance of their judicial duties should receive survivor benefits at the maximum level and on the same basis as now provided for the most senior category of public servants for whom such benefits are currently provided.

(Section 5.3)

Recommendation 21

When the dental plan is amended to provide coverage to retirees, retired judges be eligible to participate on the same terms and conditions as other retirees.

(Section 5.4)

Recommendation 22

The Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payment by the Government not to exceed the aggregate amount of \$230,000, inclusive of the amount of \$80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budget of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.

(Section 6.5)

Appendix 1

Notices to the Public List of Newspapers/Publications and Date

The Globe and Mail	November 6 & 11, 1999
National Post	November 6 & 11, 1999
St. John's Evening Telegram	November 6, 1999
Halifax Chronicle Herald	November 9, 1999
Yarmouth Le Courrier de la N.D.	November 12, 1999
Charlottetown Guardian	November 6, 1999
Summerside la Voix Acadienne	November, 10, 1999
Caraquet L'Acadie Nouvelle	November 10, 1999
Saint-John Telegraph Journal	November 9, 1999
Quebec Le Soleil	November 6, 1999
Quebec Chronicle Telegraph	November 10, 1999
Montreal La Presse	November 6, 1999
Montreal The Gazette	November 6, 1999
Ottawa Le Droit	November 6, 1999
Ottawa the Citizen	November 6, 1999
Toronto Star	November 9, 1999
Toronto L'Express	November 9, 1999
Winnipeg Free Press	November 9, 1999
St. Boniface La Liberte	November 12, 1999
Regina Leader Post	November 6, 1999
Saskatoon Star Pheonix	November 6, 1999
Regina L'Eau Vive	November 11, 1999
Calgary Herald	November 6, 1999
Edmonton Journal	November 6, 1999
Edmonton le Franco-Albertain	November 12, 1999
Vancouver Province	November 14, 1999
Vancouver Sun	November 6, 1999
Vancouver L'Express du Pacifique	November 6, 1999
Yellowknife The Yellowknifer	November 8, 1999
Yellowknife L'Aquilon	November 12, 1999
Whitehorse Star	November 12, 1999
Whitehorse L'Aurore Boreale	November 12, 1999
Law Times	November 15, 1999
The Lawyers Weekly	November 19, 1999

Appendix 1

Example of the Notice

Appendix 2

List of Submissions Received by the Commission (in Alphabetical Order)

Submissions from Organizations, Associations and Departments

- Canadian Bar Association
- Canadian Judges Conference/Canadian Judicial Council
- Canadian Judicial Council
- Government of Canada
- Law Society of Alberta
- Supreme Court of Canada

Individual Submissions

- Mr. A. Steven Adler
- Mr. Ian Bailey
- Hon. Mr. Justice R.L. Berger
- Hon. Madam Justice Alice Desjardins
- Hon. Mr. David Hancock, Alberta Minister of Justice
- Mr. John Honsberger
- Hon. Madam Justice Wallis Kempo
- Hon. Madam Justice Ruth Krindle, Hon. Madam Justice Holly Beard, Hon. Madam Justice Barbara Hamilton
- Hon. Mr. Justice Douglas Lambert
- Hon. D.B. Mason, Hon. B.L. Rawlins, Hon. J.D. Rooke, Hon. L.D. Wilkins, Hon. C.S. Phillips, Hon. S.J. LoVecchio, Hon. G.C. Hawco, Hon. M.S. Paperny, Hon. P.W. Martin
- Hon. Mr. Justice J.J. Michel Robert
- Ms. Karen Selick
- Hon. Mr. Justice Paul B. Staniszewski
- Professor Jacob Ziegel

NOTICE OF HEARING

A public hearing has been scheduled for the Judicial Compensation and Benefits Commission on **February 14, 2000** at the Canadian Government Conference Centre at 2 Rideau St. in Ottawa. The name of the conference room and hearing times will be announced at a later date.

If you wish to make a presentation to the Commission, please send a notification to:

Ms. Deborah Lapierre
Executive Director
Judicial Compensation and Benefits Commission
99 Metcalfe St.
Ottawa, Ontario
K1A 1E3

or

By e-mail to: info@quadcom.gc.ca

Appendix 3

LIST OF PARTICIPANTS AT HEARING February 14, 2000

Canadian Bar Association

Mr. Eugene Meehan	President
Ms. Judith MacPherson	Chair, Judicial Salary and Benefits Committee

Canadian Judges Conference/Canadian Judicial Council

Counsel

Mr. Yves Fortier	Ogilvy Renault
Mr. Leigh Crestohl	Ogilvy Renault

Canadian Judges Conference

Madam Justice Myra B. Bielby	President
Mr. Justice Robert A. Blair	
Mr. Justice Guy Kroft	

Canadian Judicial Council

Associate Chief Justice André Deslongchamps

Government of Canada

Counsel

Mr. David Sgayias	Civil Litigation
Ms. Judith Bellis	Judicial Affairs Unit

Other Representatives

Ms. Janice Charette	Senior Assistant Deputy Minister
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Other

Madam Justice Alice Desjardins

Ms. Mary Eberts	Eberts Symes Street & Corbett, Counsel for Madam Justice Krindle, Madam Justice Beard & Madam Justice Hamilton
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Mr. Justice J.J. Michel Robert

NOTICE OF HEARING

A continuation of the public hearing for the Judicial Compensation and Benefits Commission has been scheduled on **March 20, 2000** in the Committee Room, Canadian Government Conference Centre, 2nd Floor, 2 Rideau St., Ottawa, from 9 a.m. to 4 p.m.

LIST OF PARTICIPANTS AT HEARING
March 20, 2000

Canadian Judges Conference/Canadian Judicial Council

Counsel

Mr. Yves Fortier
Mr. Leigh Crestohl

Ogilvy Renault
Ogilvy Renault

Canadian Judges Conference

Madam Justice Myra B. Bielby
Mr. Justice Robert A. Blair
Mr. Justice Guy Kroft

President

Canadian Judicial Council

Associate Chief Justice André Deslongchamps

Government of Canada

Counsel

Mr. David Sgayias
Ms. Judith Bellis

Civil Litigation
Judicial Affairs Unit

Other

Mr. Justice Douglas Lambert

LAWYERS AGED 44 TO 56

CANADA & PROVINCES

NET PROFESSIONAL INCOME IN 65TH TO 85TH PERCENTILE (IN MULTIPLE OF 5)
SUPPRESSING INCOMES BELOW \$50,000 FOR THE 1997 TAX YEAR

		65TH TO 85TH PERCENTILE				
		65	70	75	80	85
		(60-65%TILE)	(65-70%TILE)	(70-75%TILE)	(75-80%TILE)	(80-85%TILE)
TOTAL CANADA	INCOME @ SPECIFIC %TILE \$000'S	182	205	230	264	306
	NUMBER OF CASES	390	390	390	390	390
	NET PROFESSIONAL INCOME \$000'S	66,989	75,151	84,770	96,031	111,277
	AVERAGE NET PROF INCOME \$000'S	171	192	217	246	284
TOTAL NEWFOUNDLAND	INCOME @ SPECIFIC %TILE \$000'S	173	185	222	252	280
	NUMBER OF CASES	.	.	.	.	.
	NET PROFESSIONAL INCOME \$000'S	.	.	.	.	.
	AVERAGE NET PROF INCOME \$000'S	.	.	.	.	.
TOTAL PEI	INCOME @ SPECIFIC %TILE \$000'S	141	168	179	184	197
	NUMBER OF CASES	.	.	.	.	.
	NET PROFESSIONAL INCOME \$000'S	.	.	.	.	.
	AVERAGE NET PROF INCOME \$000'S	.	.	.	.	.
TOTAL NOVA SCOTIA	INCOME @ SPECIFIC %TILE \$000'S	157	171	191	209	229
	NUMBER OF CASES	10	10	10	10	10
	NET PROFESSIONAL INCOME \$000'S	2,127	2,125	2,351	2,805	2,839
	AVERAGE NET PROF INCOME \$000'S	152	163	181	200	218
TOTAL NEW BRUNSWICK	INCOME @ SPECIFIC %TILE \$000'S	151	164	177	205	232
	NUMBER OF CASES	.	.	.	.	.
	NET PROFESSIONAL INCOME \$000'S	.	.	.	.	.
	AVERAGE NET PROF INCOME \$000'S	.	.	.	.	.
TOTAL QUEBEC	INCOME @ SPECIFIC %TILE \$000'S	172	191	209	232	263
	NUMBER OF CASES	80	80	80	80	80
	NET PROFESSIONAL INCOME \$000'S	12,351	13,992	15,405	17,007	19,034
	AVERAGE NET PROF INCOME \$000'S	163	182	200	221	247

Note: Any count less than 10 along with its associated dollar values has been suppressed.
Remaining counts have been rounded to the nearest multiple of 10.

(... Continued)

LAWYERS AGED 44 TO 54

CANADA & PROVINCES

	65TH TO 85TH PERCENTILE				
	65 (60-65%ILE)	70 (65-70%ILE)	75 (70-75%ILE)	80 (75-80%ILE)	85 (80-85%ILE)
TOTAL ONTARIO					
INCOME @ SPECIFIC %ILE \$000'S	195	223	260	305	357
NUMBER OF CASES	180	180	180	180	180
NET PROFESSIONAL INCOME \$000'S	33,829	38,054	43,498	51,241	60,817
AVERAGE NET PROF INCOME \$000'S	184	208	238	280	331
TOTAL MANITOBA					
INCOME @ SPECIFIC %ILE \$000'S	143	156	176	203	238
NUMBER OF CASES	10	10	10	10	10
NET PROFESSIONAL INCOME \$000'S	1,797	1,962	2,175	2,615	2,856
AVERAGE NET PROF INCOME \$000'S	138	151	167	187	220
TOTAL SASKATCHEWAN					
INCOME @ SPECIFIC %ILE \$000'S	139	152	163	184	208
NUMBER OF CASES	10	10	10	10	10
NET PROFESSIONAL INCOME \$000'S	1,466	1,463	1,739	1,751	2,127
AVERAGE NET PROF INCOME \$000'S	133	146	158	175	193
TOTAL ALBERTA					
INCOME @ SPECIFIC %ILE \$000'S	195	240	283	315	369
NUMBER OF CASES	30	30	30	30	30
NET PROFESSIONAL INCOME \$000'S	4,549	5,732	6,501	7,448	8,437
AVERAGE NET PROF INCOME \$000'S	182	220	260	298	337
TOTAL B.C.					
INCOME @ SPECIFIC %ILE \$000'S	193	213	236	262	293
NUMBER OF CASES	50	50	50	50	50
NET PROFESSIONAL INCOME \$000'S	9,645	10,850	11,978	12,969	14,638
AVERAGE NET PROF INCOME \$000'S	182	205	226	249	276

Note: Any count less than 10 along with its associated dollar values has been suppressed.
Remaining counts have been rounded to the nearest multiple of 10.

NET PROFESSIONAL INCOME IN 65TH TO 85TH PERCENTILE (IN MULTIPLE OF 5)
SUPPRESSING INCOMES BELOW \$50,000 FOR THE 1997 TAX YEAR

LAWYERS AGED 44 TO 56

65TH TO 85TH PERCENTILE

	65 (60-65%ILE)	70 (65-70%ILE)	75 (70-75%ILE)	80 (75-80%ILE)	85 (80-85%ILE)
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CMA'S AND OTHERS

SEVEN LARGE CMAS

INCOME @ SPECIFIC %ILE \$000'S	225	252	284	323	373
NUMBER OF CASES	240	240	240	240	240
NET PROFESSIONAL INCOME \$000'S	50,455	55,993	63,071	71,414	81,798
AVERAGE NET PROF INCOME \$000'S	214	237	267	303	347

OUTSIDE 7 LARGE CMAS

INCOME @ SPECIFIC %ILE \$000'S	134	144	158	181	205
NUMBER OF CASES	160	160	160	160	160
NET PROFESSIONAL INCOME \$000'S	19,734	21,615	23,492	26,359	29,813
AVERAGE NET PROF INCOME \$000'S	127	139	152	170	192

Note: Any count less than 10 along with its associated dollar values has been suppressed.
Remaining counts have been rounded to the nearest multiple of 10.

Source : Morneau Sobeco, 2000

NET PROFESSIONAL INCOME IN 65TH TO 85TH PERCENTILE (IN MULTIPLE OF \$)
SUPPRESSING INCOMES BELOW \$50,000 FOR THE 1997 TAX YEAR

LAWYERS AGED 44 TO 55

65TH TO 85TH PERCENTILE

		65	70	75	80	85
		(40-65%ILE)	(65-70%ILE)	(70-75%ILE)	(75-80%ILE)	(80-85%ILE)
CMA'S AND OTHERS						
	TORONTO CMA					
	INCOME @ SPECIFIC %ILE \$000'S	269	307	343	391	446
	NUMBER OF CASES	100	100	100	100	100
MONTREAL CMA	NET PROFESSIONAL INCOME \$000'S	25,170	29,026	33,297	37,070	42,426
	AVERAGE NET PROF INCOME \$000'S	251	287	326	367	421
	INCOME @ SPECIFIC %ILE \$000'S	208	225	248	269	302
	NUMBER OF CASES	50	50	50	50	50
VANCOUVER CMA	NET PROFESSIONAL INCOME \$000'S	8,964	9,726	10,538	11,645	12,773
	AVERAGE NET PROF INCOME \$000'S	199	216	234	259	284
	INCOME @ SPECIFIC %ILE \$000'S	223	244	266	290	319
	NUMBER OF CASES	40	40	40	40	40
OTTAWA-HULL CMA	NET PROFESSIONAL INCOME \$000'S	8,377	8,922	9,930	10,503	11,816
	AVERAGE NET PROF INCOME \$000'S	215	235	255	276	303
	INCOME @ SPECIFIC %ILE \$000'S	161	178	198	227	287
	NUMBER OF CASES	20	20	20	20	20
EDMONTON CMA	NET PROFESSIONAL INCOME \$000'S	2,792	2,873	3,146	3,616	4,500
	AVERAGE NET PROF INCOME \$000'S	155	169	185	213	250
	INCOME @ SPECIFIC %ILE \$000'S	139	152	163	184	212
	NUMBER OF CASES	.	.	.	.	.
CALGARY CMA	NET PROFESSIONAL INCOME \$000'S	.	.	.	.	.
	AVERAGE NET PROF INCOME \$000'S	.	.	.	.	.
	INCOME @ SPECIFIC %ILE \$000'S	297	323	375	418	446
	NUMBER OF CASES	20	10	20	10	20
QUEBEC CMA	NET PROFESSIONAL INCOME \$000'S	4,347	4,383	5,176	5,514	6,471
	AVERAGE NET PROF INCOME \$000'S	290	313	345	394	431
	INCOME @ SPECIFIC %ILE \$000'S	179	192	204	219	235
	NUMBER OF CASES	10	10	10	10	10
	NET PROFESSIONAL INCOME \$000'S	1,891	2,236	2,175	2,321	2,750
	AVERAGE NET PROF INCOME \$000'S	172	186	199	211	239

Note: Any count less than 10 along with its associated dollar values has been suppressed.
Remaining counts have been rounded to the nearest multiple of 10.

Estimated Compensation Value of Judicial Annuity

Regarding Lawyers in Private Practice

We have calculated, on the basis of the actuarial assumptions attached herewith, the additional salary that would be required to accumulate in RRSPs and after-tax savings the funds necessary to provide a retirement income equivalent to the judicial annuity (plus the compensation value of the supernumerary status) on an after-tax basis, for a judge appointed at the age of 50.

On this basis, the additional 1997 salary was estimated, for a male judge, to be within a range of \$95,000 to \$120,000 determined as 55% and 70%, respectively, of the adjusted 1997-98 salary of \$172,000, including the 4.1% adjustment effective April 1, 1998 pursuant to Bill C-37. The value of the annuity would be slightly higher for a female judge.

The above additional salary requirement would apply to a lawyer in private practice between the ages of 50 and 65/70 who does not have access to pension benefits other than those funded through his or her RRSP and after-tax savings.

Appendix 5

Regarding DM-3s

For judges and DM-3s appointed at the same age and serving for the same period, we have calculated the additional salary as a percentage of pay, required to accumulate in after-tax savings funds necessary to provide a retirement income equivalent to the difference between the judicial annuity and the DM-3 pension (and special retiring allowance where applicable), on an after-tax basis as follows:

Appointment Age	Male Judge Retiring at 65	Male Judge Retiring at 70	Female Judge Retiring at 65	Female Judge Retiring at 70
50	25%	25%	26%	26%
45	10%	4%	11%	4%
40	2%	Nil	2%	Nil

These estimates have been prepared on the basis of the attached actuarial assumptions, and assuming a salary of \$200,000 in 2000.

The DM-3s' special retiring allowance was taken into account for the 10 year maximum, thus adding to the regular DM-3 pension a retiring allowance of 20% of the best 5 year average earnings.

The additional salary required to finance the difference in pension benefits was assumed to accumulate exclusively in after-tax savings as DM-3s have very little RRSP contribution room left.

The comparison takes into account the contribution rates of judges and DM-3s (7% and 7.5% respectively) toward their pension benefits.

Summary Description of Actuarial Assumptions

Inflation Rate: 3% per annum

Salary Increases: 4% per annum

Interest Rate: 7.5% per annum

We have assumed that, for income tax purposes, funds accumulating outside of RRSPs would earn investment income made up of 50% interest, 25% dividends and 25% capital gains. For the sake of simplicity, we have also assumed that the marginal tax rate is 50% for all judges, regardless of the province of residence.

Retirement Age: 65 or 70

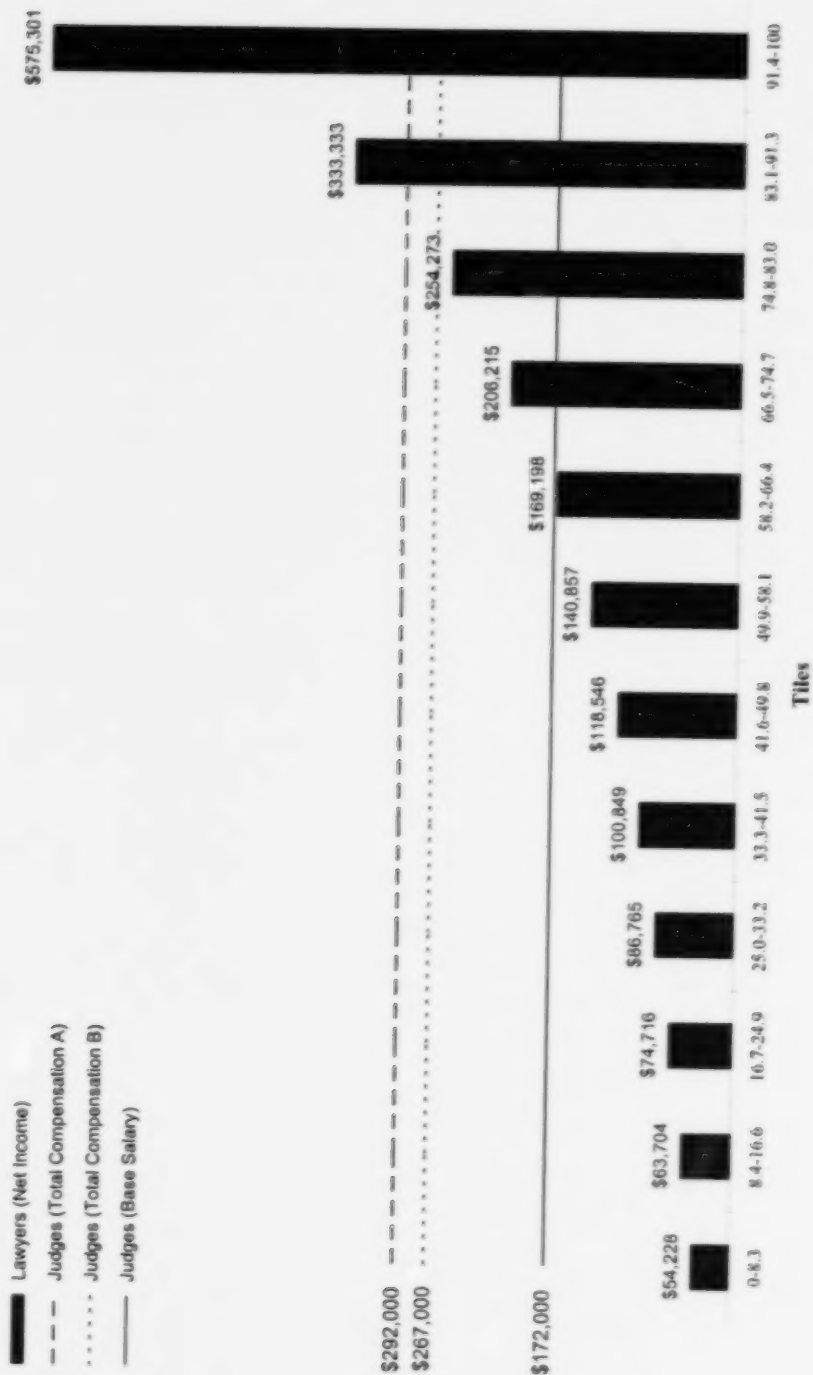
We have assumed that 2/3rd of judges who retire at 70, elect supernumerary status at age 65 and maintain a 50% workload during the five year period between age 65 and 70.

Mortality: We have assumed, for the sake of simplicity, no mortality before retirement and mortality rates after retirement equal to 80% of the 1983 Group Annuity Mortality table for males and 90% of the rates in the same table for females.

Proportion Married: We have assumed that 90% of male members and 80% of female members would be married at retirement and that the male spouse would be 3 years older than the female spouse.

Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

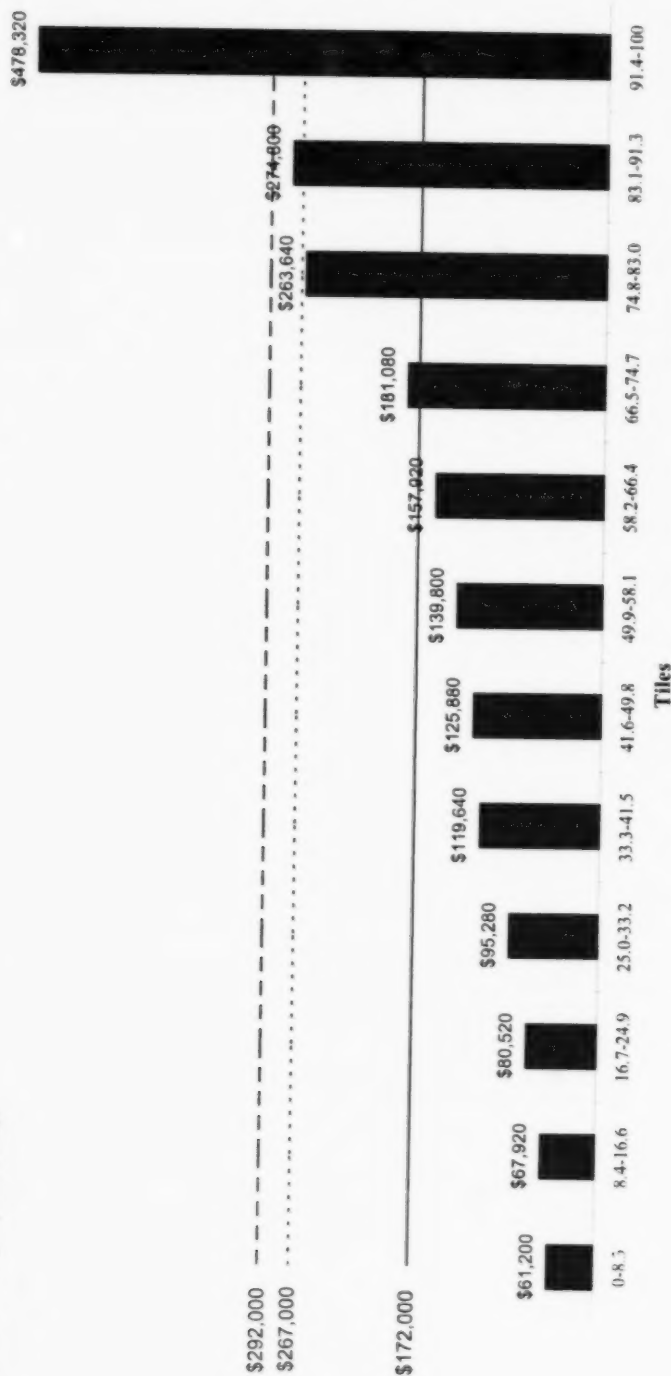
Region: Canada
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 7,830



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

Region: Newfoundland
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 100

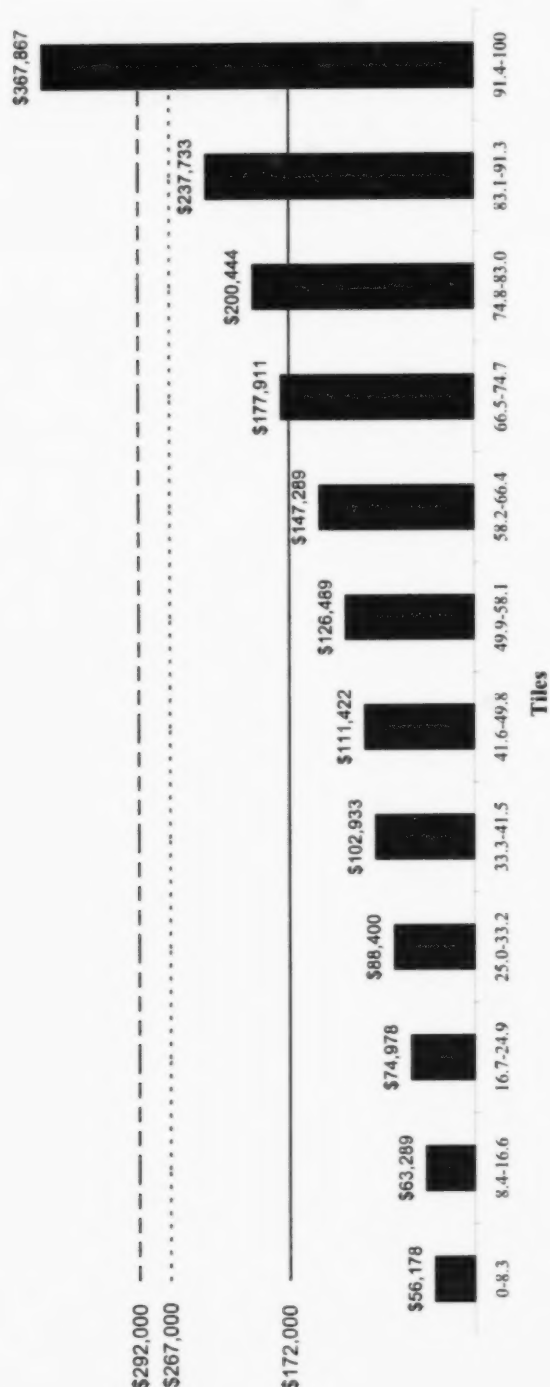
■ Lawyers (Net Income)
 - - - Judges (Total Compensation A)
 Judges (Total Compensation B)
 — Judges (Base Salary)



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

Region: Nova Scotia
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 270

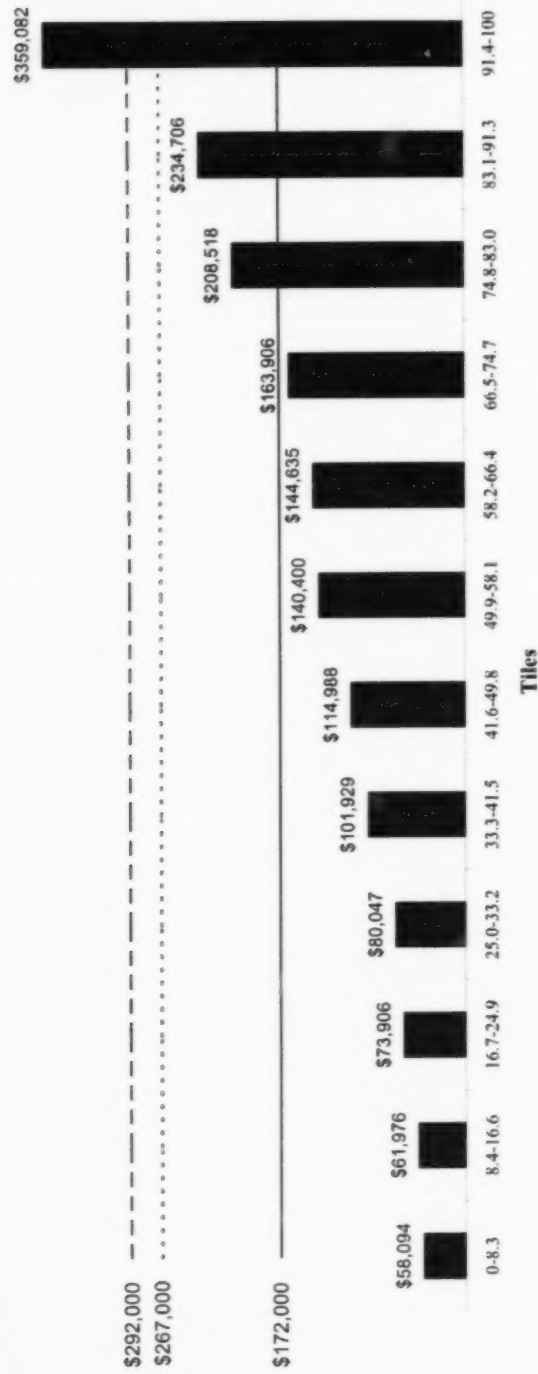
Lawyers (Net Income)
Judges (Total Compensation A)
Judges (Total Compensation B)
Judges (Base Salary)



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

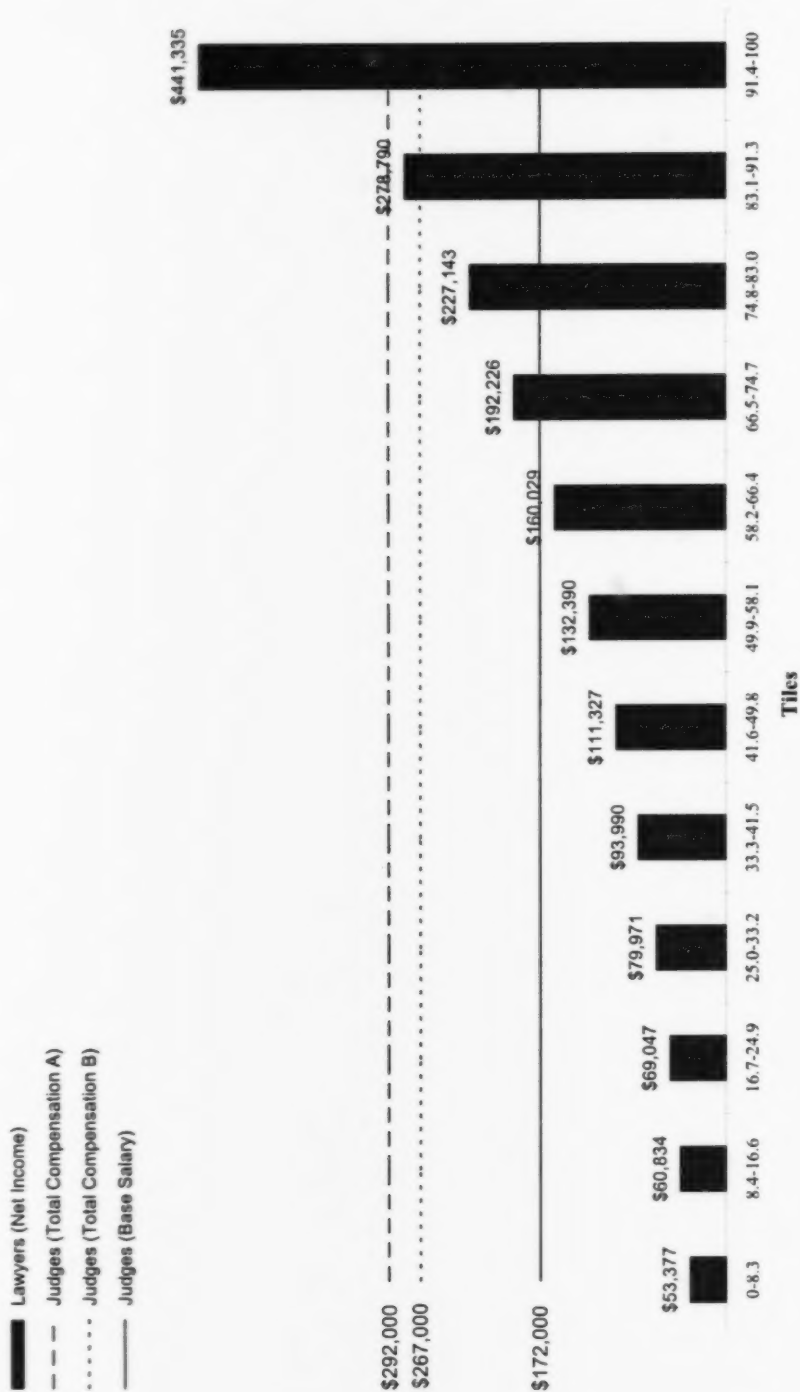
Region: New Brunswick
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 170

■ Lawyers (Net Income)
 - - - Judges (Total Compensation A)
 Judges (Total Compensation B)
 — Judges (Base Salary)



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

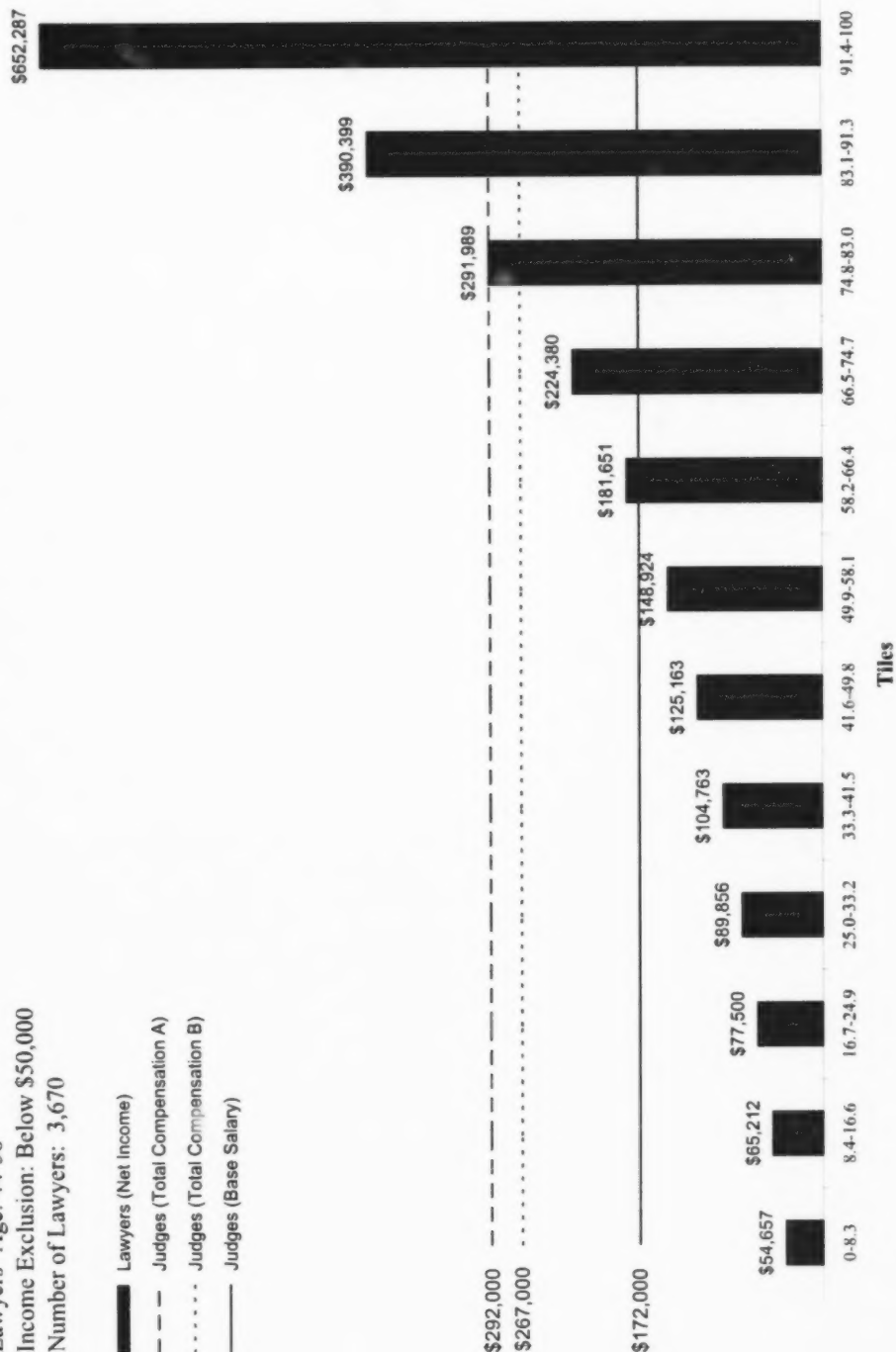
Region: Quebec (Province)
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 1,540



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

Region: Ontario
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 3,670

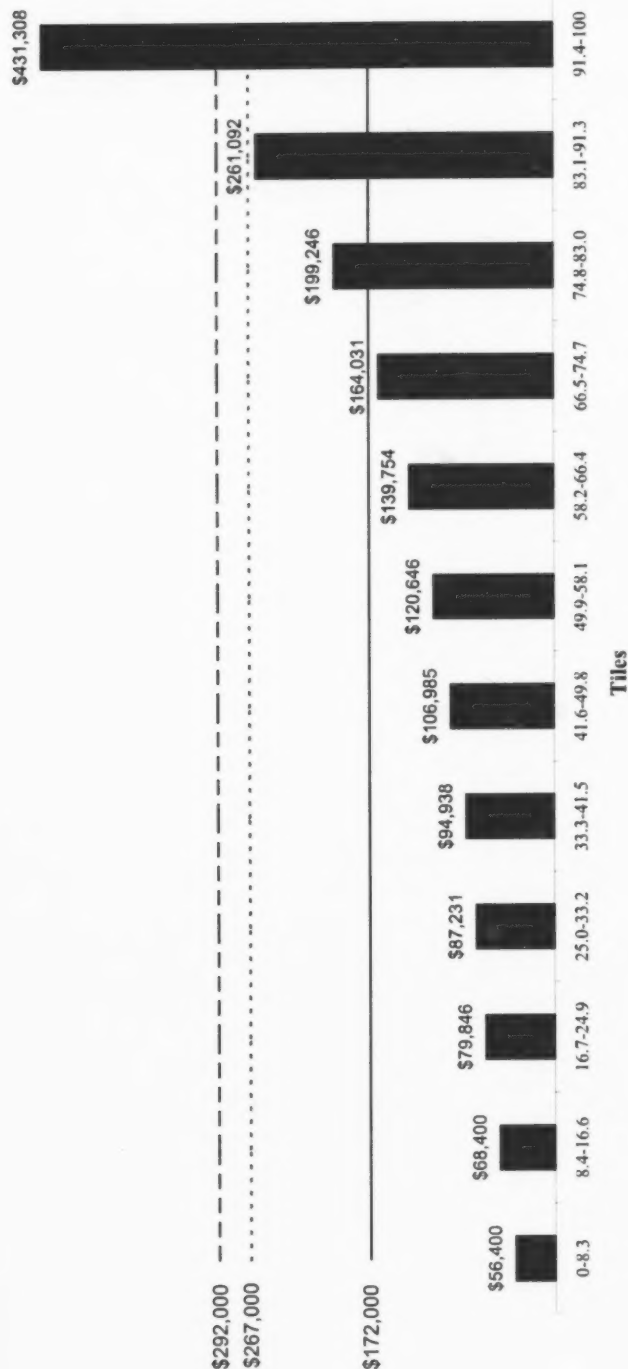
Lawyers (Net Income)
Judges (Total Compensation A)
Judges (Total Compensation B)
Judges (Base Salary)



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

Region: Manitoba
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 260

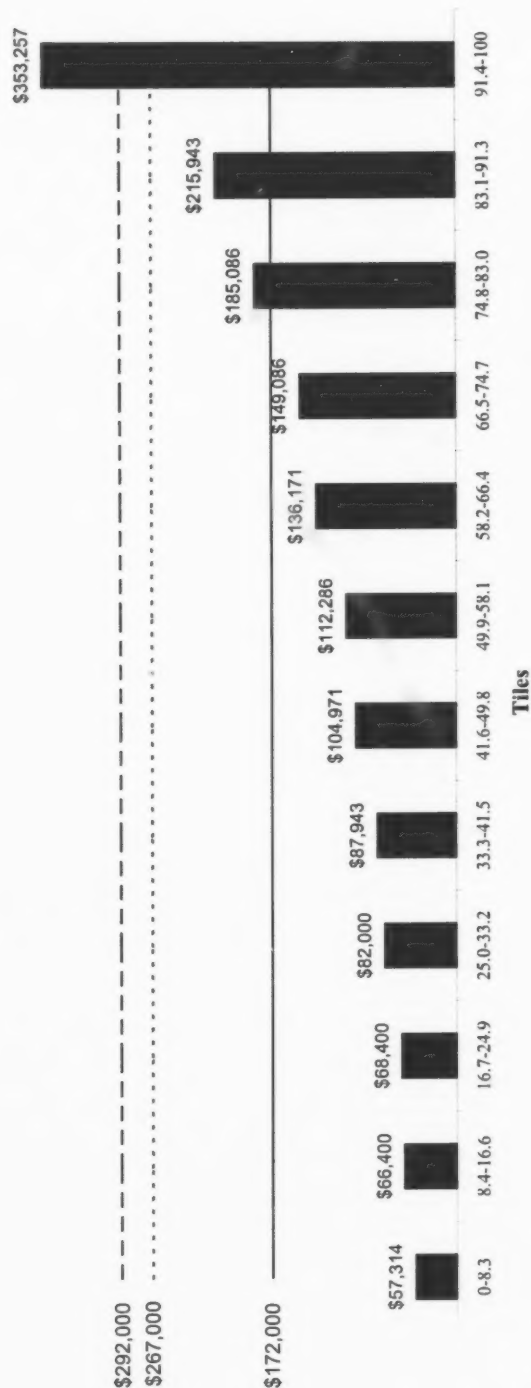
Lawyers (Net Income)
Judges (Total Compensation A)
Judges (Total Compensation B)
Judges (Base Salary)



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

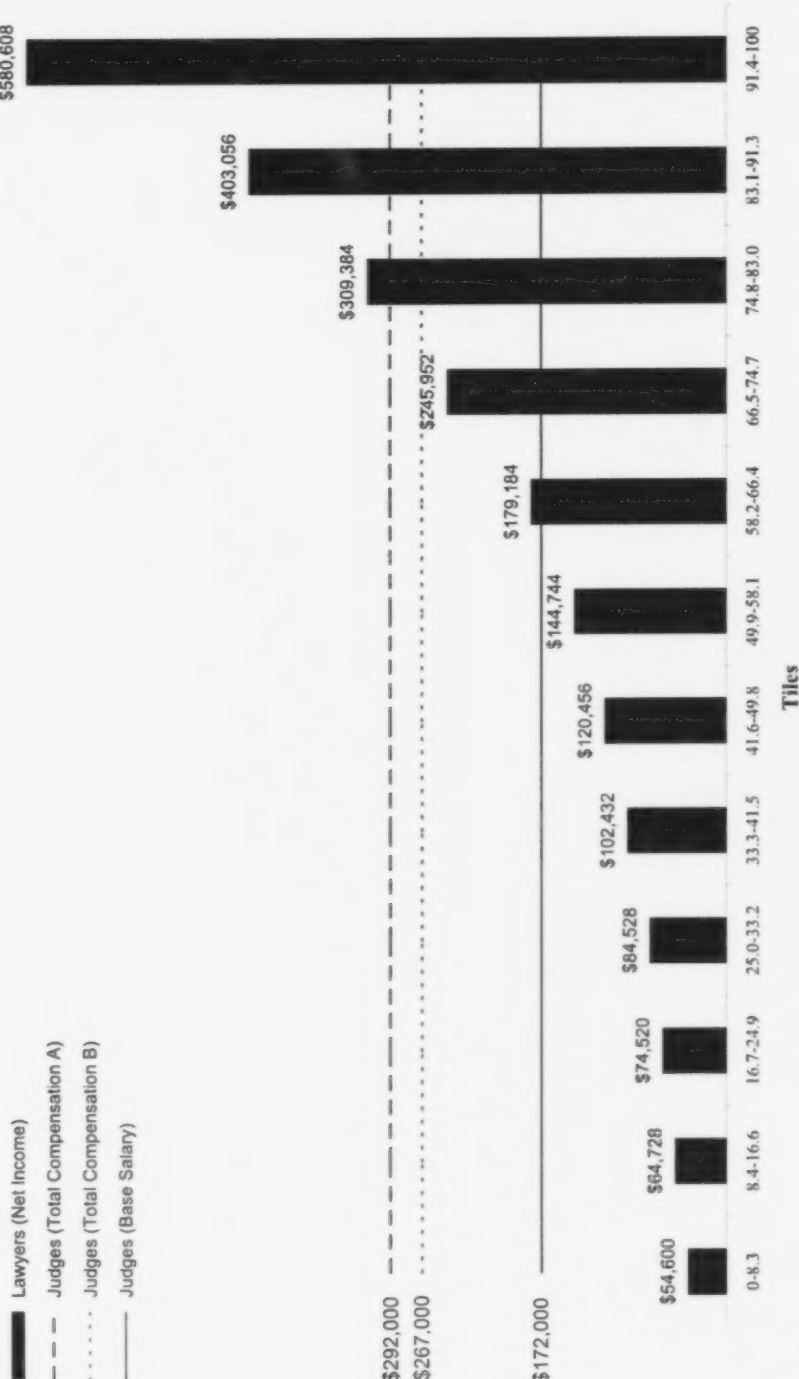
Region: Saskatchewan
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 210

■ Lawyers (Net Income)
 - - - Judges (Total Compensation A)
 Judges (Total Compensation B)
 ——— Judges (Base Salary)



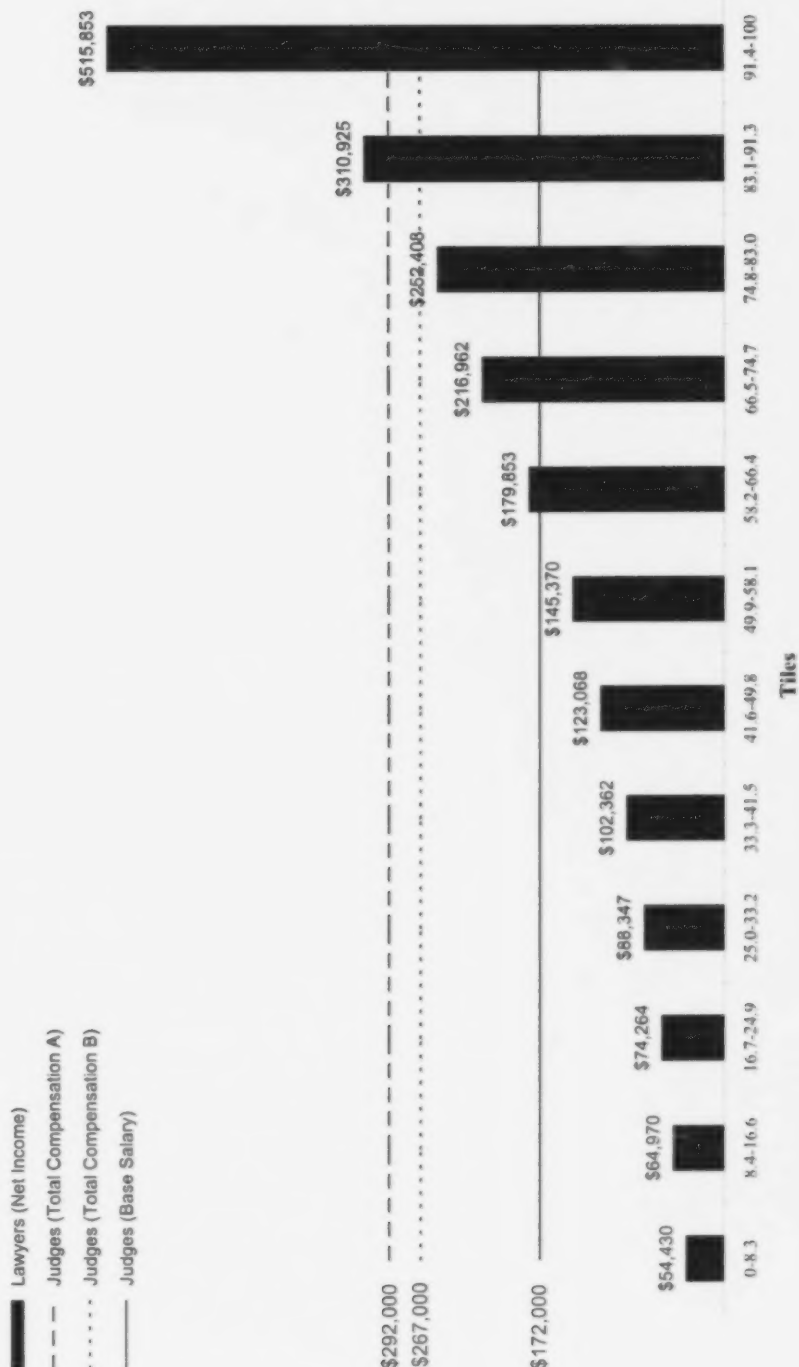
Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

Region: Alberta
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 500



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

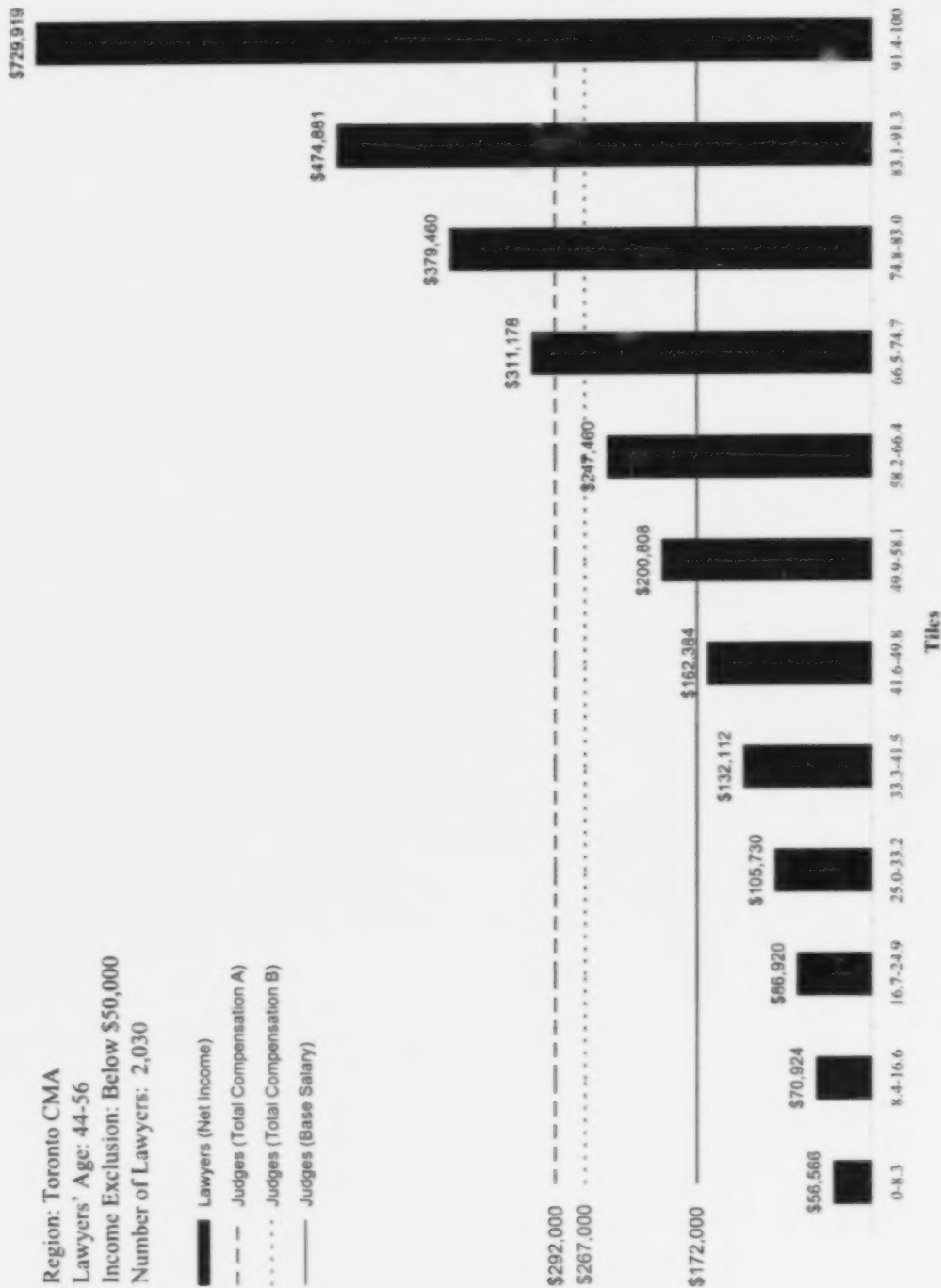
Region: British Columbia
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 1,060



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

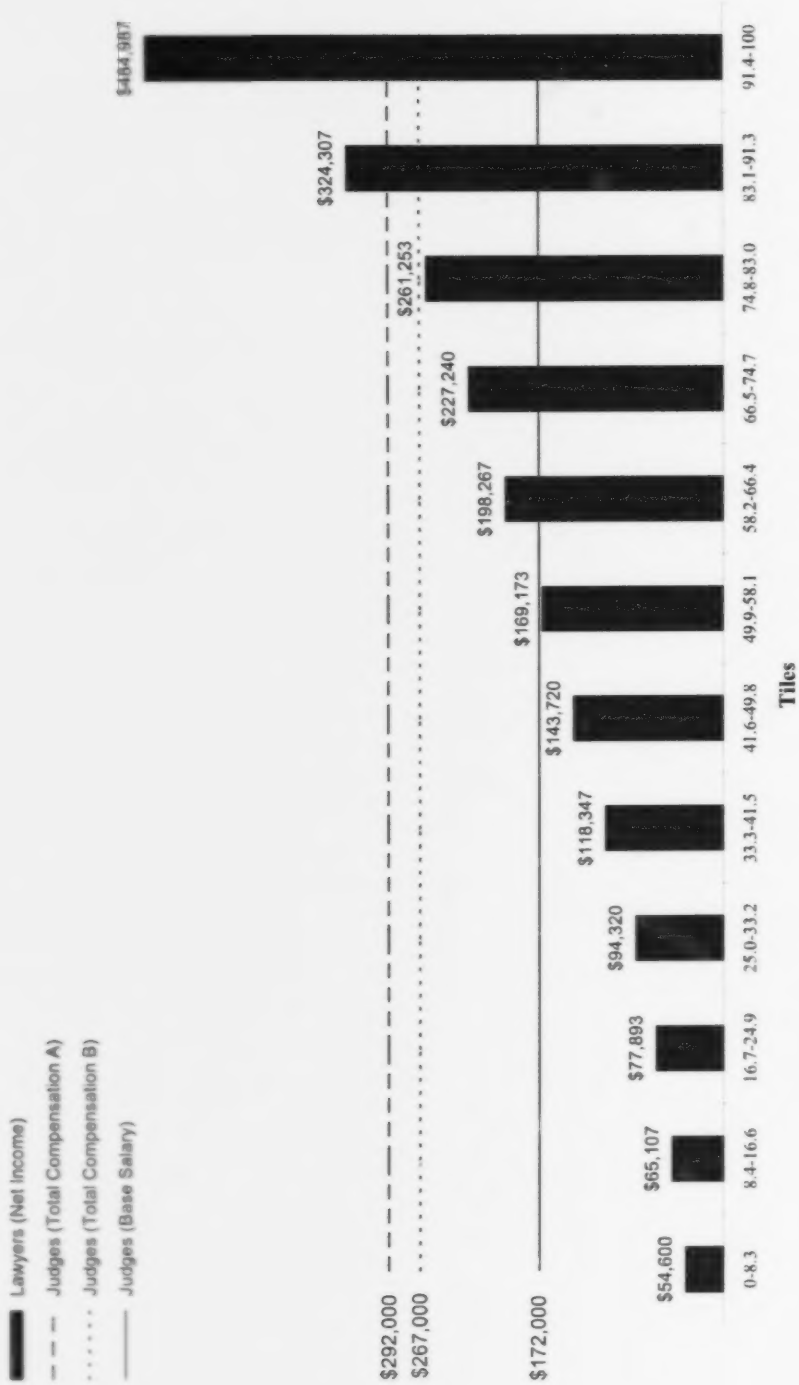
Region: Toronto CMA
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 2,030

Lawyers (Net Income)
Judges (Total Compensation A)
Judges (Total Compensation B)
Judges (Base Salary)



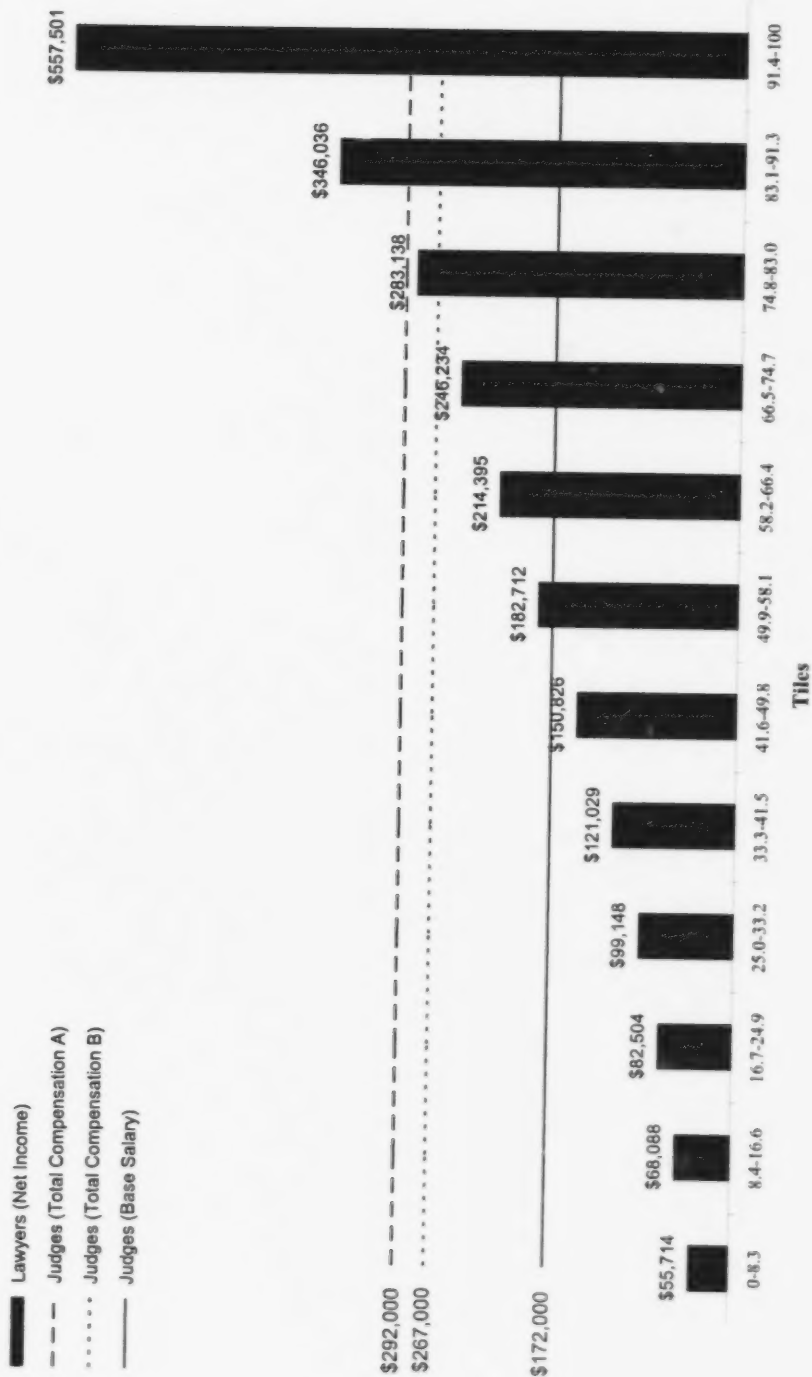
Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

Region: Montreal CMA
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 900



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

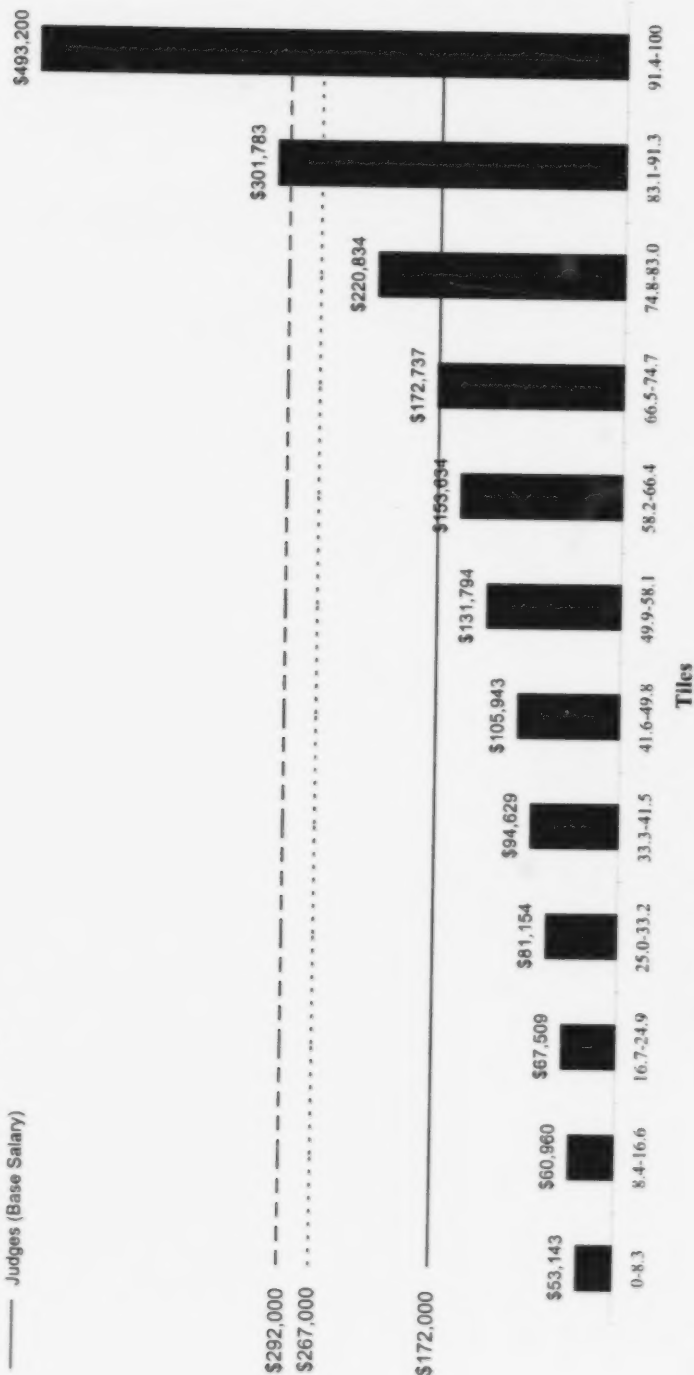
Region: Vancouver CMA
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 770



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

Region: Ottawa-Hull CMA
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 350

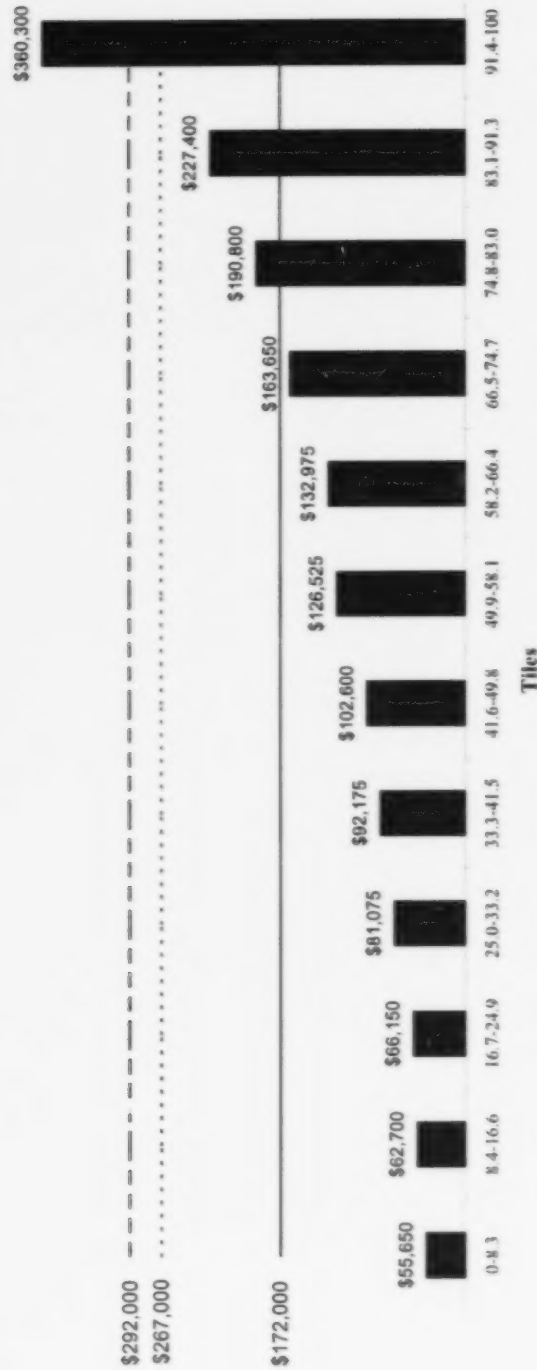
Lawyers (Net Income)
Judges (Total Compensation A)
Judges (Total Compensation B)
Judges (Base Salary)



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

Region: Edmonton CMA
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 160

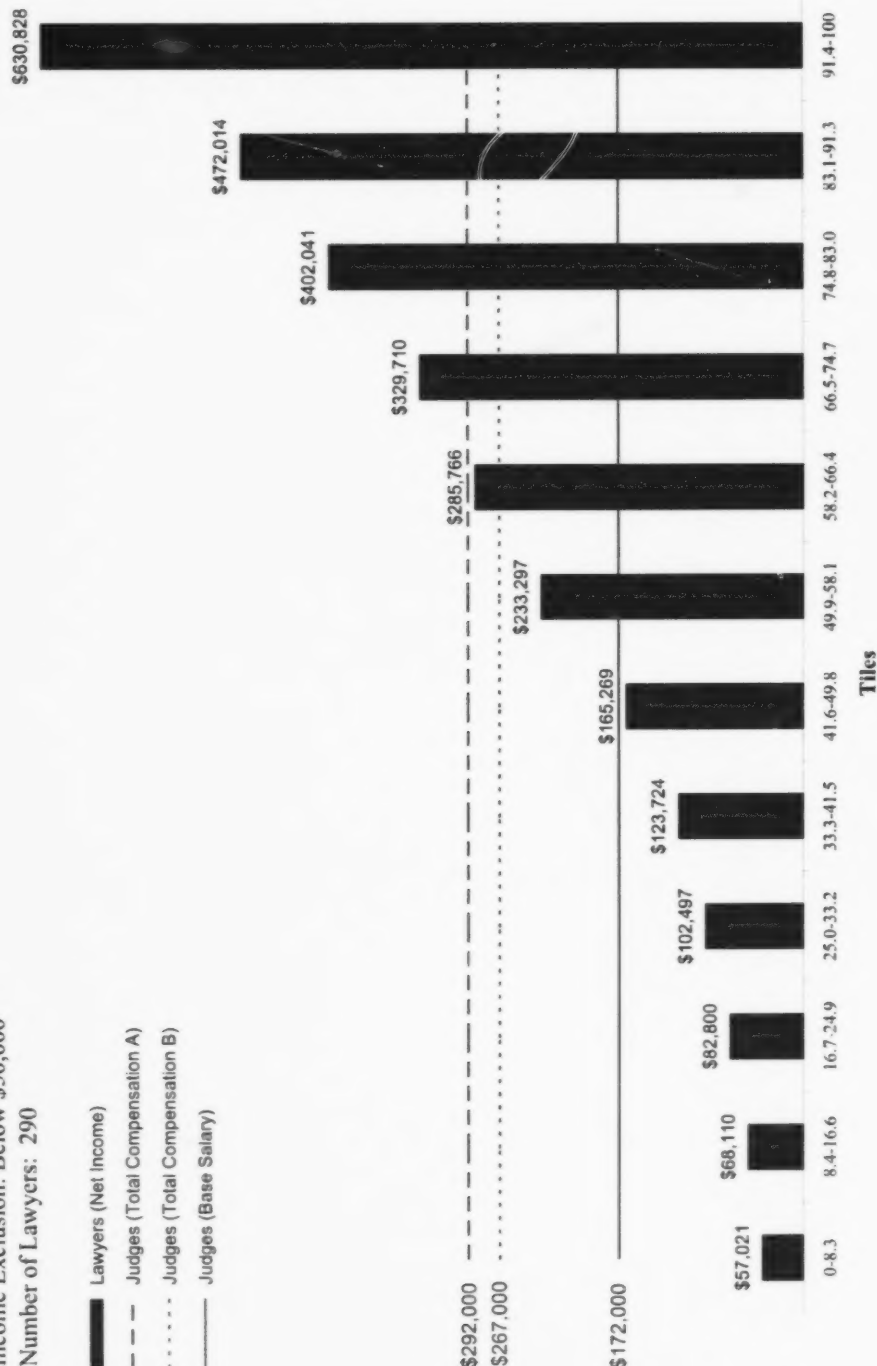
Lawyers (Net Income)
Judges (Total Compensation A)
Judges (Total Compensation B)
Judges (Base Salary)



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

Region: Calgary CMA
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 290

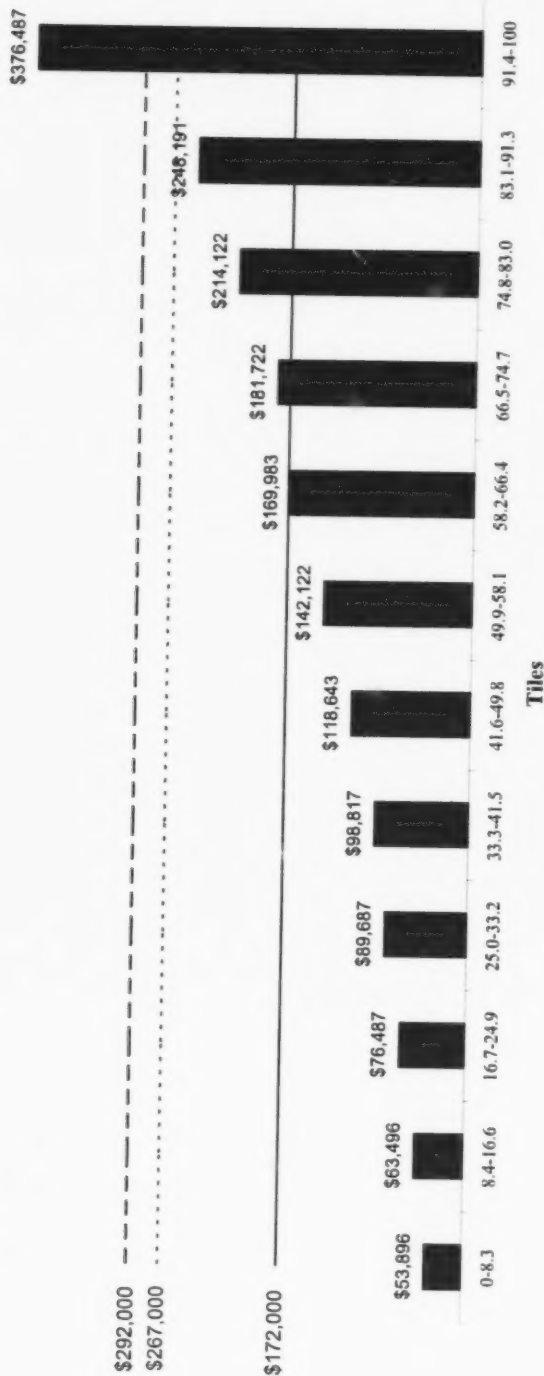
■ Lawyers (Net Income)
 - - - Judges (Total Compensation A)
 Judges (Total Compensation B)
 ——— Judges (Base Salary)



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

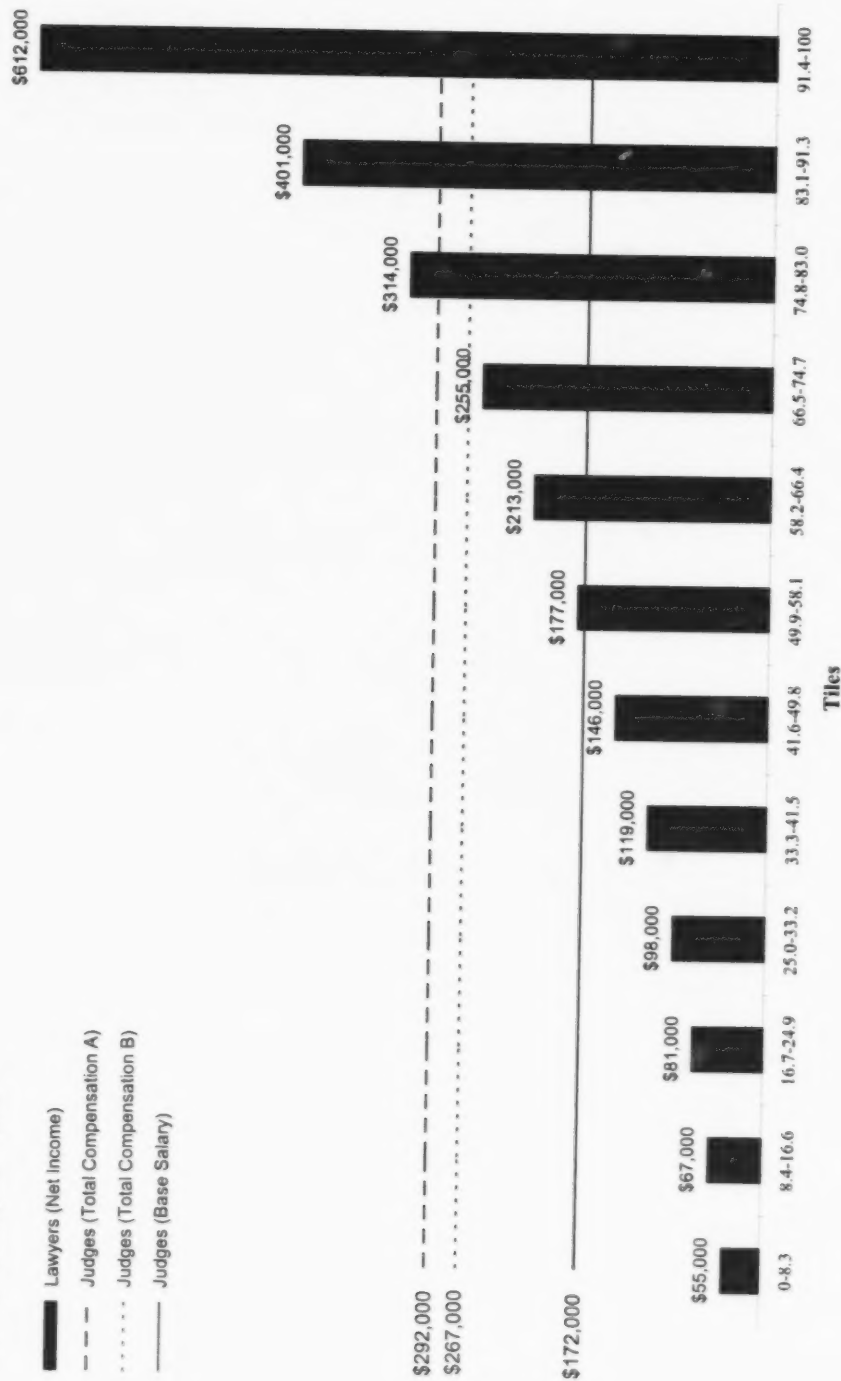
Region: Quebec CMA
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 230

■ Lawyers (Net Income)
 - - - Judges (Total Compensation A)
 Judges (Total Compensation B)
 — Judges (Base Salary)



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

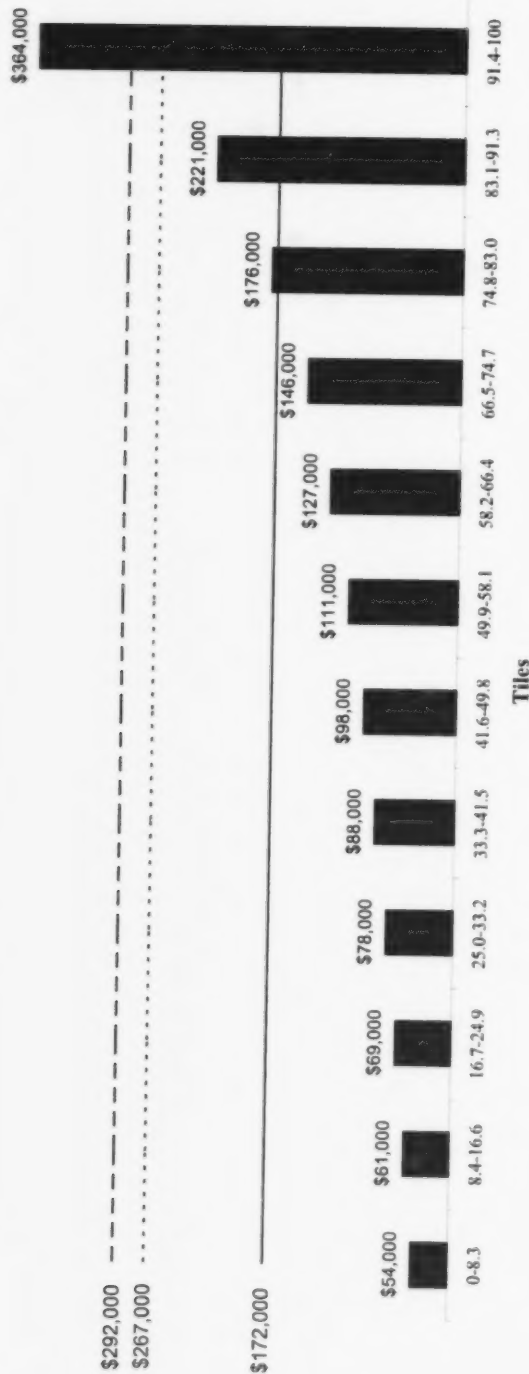
Region: Seven Largest CMAs
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 4,720



Net Income Distribution of Lawyers in Private Practice Compared to the Base Salary and Total Compensation of Federal Judges (1997)

Region: Outside the Seven Largest CMAs
Lawyers' Age: 44-56
Income Exclusion: Below \$50,000
Number of Lawyers: 3,100

- Lawyers (Net Income)
- Judges (Total Compensation A)
- Judges (Total Compensation B)
- Judges (Base Salary)



April 18, 2000

Privileged and Confidential

Mr. Richard Drouin, O.C., Q.C.
Chair
Judicial Compensation and Benefits Commission
8th Floor
99 Metcalf Street
Ottawa, ON K1A 1E3

Dear Mr. Drouin,

Re: Section 42(1)(a) of the Judges Act

You have asked for my advice as to whether the criteria for retirement benefits set out in s. 42(1)(a) of the *Judges Act*, R.S.C. 1985, C. J-1 (the "*Act*") and, in particular, the "modified Rule of 80" which it establishes, violate section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). You have asked that in responding to your request I specifically address the submissions that have been made to the Judicial Compensation and Benefits Commission (the "Commission") on this matter by various interested parties.

SUMMARY OF CONCLUSIONS

Under the modified rule of 80 provided for in section 42(1)(a) of the *Act*, two criteria must be satisfied in order for a judge to qualify for an annuity equal to two thirds of salary at the time of retirement:

- (i) the combined age and number of years in judicial office must equal 80; and
- (ii) the judge must have continued in office for at least 15 years.

These criteria are said to give rise to equality rights concerns under section 15 of the *Charter* on the theory that younger judicial appointees, the majority of whom are women, are required to work longer and to pay more in order to receive an annuity that is exactly the same as that paid to older appointees.

In my view, however, there are three significant reasons why an equality rights challenge brought on this basis would be unlikely to succeed.

First, although younger judicial appointees are required to work longer and pay more than older appointees in order to qualify for a full two-thirds annuity upon retirement, the value of the annuity available to a younger appointee is far greater than that available to an older appointee. This results from a number of factors, the most important being that under the modified rule of 80 the younger appointee is entitled to retire at a younger age. For example, a judge appointed at age 40 will be entitled to retire with a two-thirds annuity at age 60, whereas a judge appointed at age 50 will not be entitled to retire with a two-thirds annuity until age 65. This means that the younger appointee and his or her survivor will generally have a longer life expectancy at retirement and will therefore collect the two-thirds annuity for a longer period of time than the older appointee. Moreover, the nominal dollar value of the annuity payable to the younger appointee will be higher since he or she will be eligible to retire with a full annuity later (assuming both were appointed at the same time), at which point judicial salaries will be higher than they were on the date that the older appointee was eligible to retire with an annuity.

The Office of the Chief Actuary was asked to calculate the relative present values of the annuities available to appointees at different ages. The actuarial analysis indicates that the annuity available to an appointee at age 40 will have a present value of approximately \$5 million in the year 2020, which is significantly higher than the present value of the annuity available to the 50 year old appointee (\$3.64 million in the year 2015) or the 60 year old appointee (\$2.64 million in the year 2015). Even discounting for inflation between the years 2015 and 2020, the present value of the 40 year old's annuity is approximately 19 per cent higher than that of the 50 year old appointee, and 63 per cent higher than that of the 60 year old appointee. Female appointees are assumed to live longer than male appointees and thus the present value of their individual annuities (considered without regard to the value of a survivor's annuity) is uniformly higher for all age groups. However the life expectancies of survivors of male appointees are assumed to be longer, which has the effect of increasing in relative terms the present value of the total annuity attributable to male judges to a level which is broadly comparable to the value of the total annuity attributable to female judges.

The Office of the Chief Actuary also calculated the ratio of contributions to benefits, as well as the normal service cost (the uniform percentage of salary that would have to be deducted from an appointee in order to fund the annuity provided at retirement) for judges appointed at different ages. This analysis indicated that there were slight variations in these ratios and normal service costs. However, such minor variations are a common feature of defined benefit pension plans, since the benefits provided are determined by a formula based on salary and years of service rather than based on the value of contributions (the latter being a feature of defined contribution pension plans). The pension plan for DM-3s (which was also analysed by the Chief Actuary at the request of the Commission) exhibits similar minor variations. Therefore minor variations in the ratio of contributions to benefits or normal service costs do not give rise to equality rights concerns.

In short, since younger appointees are entitled to receive an annuity with a present value that is far greater than older appointees, they cannot be said to be subject to unequal treatment.

Even if this first consideration were not to prove decisive, the second reason why an equality rights claim would be unlikely to succeed is that the age of judicial appointment is within the significant control of the appointee. Only those who apply are eligible for appointment. Once an applicant has been assessed by the appropriate judicial appointment advisory committee, he or she is eligible to be appointed at any time within the next two years. If an appointment is not made within that time period, the candidate is asked to re-apply and is then reassessed. Therefore, while the precise date of an appointment is determined by the Governor in Council, the two-year time period or window within which such an appointment can be made is determined by the candidate. Thus if a potential candidate came to the view that the judicial annuity scheme is discriminatory towards younger appointees, he or she could avoid this discrimination by waiting to apply until a later date. On this basis, even if it were to be found that there was some form of inequality inherent in the judicial annuity scheme, it is arguable that the inequality can be avoided by the conscious choice of candidates and thus cannot give rise to a successful equality rights claim.

The third consideration relevant to the likely success of an equality rights claim is that only laws that are 'discriminatory' have been found to be inconsistent with section 15. The Supreme Court of Canada has stated that a law will be held to be discriminatory where it "demeans a claimant's dignity" or where it "perpetuates or promotes the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society..." Even if the judicial annuity scheme were to be found to impose some form of unequal treatment, it nevertheless confers a significant economic benefit on judicial appointees of all ages. Therefore it is very unlikely that the judicial annuity scheme could be held to be discriminatory, within the definition elaborated by the Supreme Court of Canada.

Since in my view the judicial annuity scheme would very likely be found not to violate section 15, it would not be necessary for a court to consider whether any limitation on rights could be justified as a reasonable limit under section 1 of the *Charter*. However, it should be noted that the Supreme Court has been extremely deferential to Parliament in previous cases dealing with retirement provisions and benefits, and I expect that same deferential approach would be applied in the context of a challenge to section 42(1)(a). Therefore, if it were found necessary to consider whether section 42(1)(a) represented a reasonable limitation on rights that could be justified under section 1, I believe that a court would be likely to find that it does represent such a reasonable limit.

ANALYSIS

1. Introduction

In this memorandum I will address only the issue whether the criteria for retirement set out in section 42(1)(a) of the *Act* are susceptible to a *Charter* challenge. I will not address any other constitutional issues that could potentially be raised in relation to any other aspect of the scheme for judicial annuities in the *Act*.

Further, although it is perhaps self-evident, it bears noting that any constitutional concerns relating to section 42(1)(a) are totally separate and distinct from the issue of whether changes should be made to the judicial annuity arrangements for other reasons.

2. Section 42(1)(a) and the "Rule of 80"

Section 42(1)(a) of the *Act* provides as follows:

42. (1) The Governor in Council shall grant to

(a) a judge who has continued in judicial office for at least fifteen years, whose combined age and number of years in judicial office is not less than eighty and who resigns from office,

[...]

an annuity equal to two-thirds of the salary annexed to the office held by the judge at time of his resignation, removal or attaining the age of retirement, as the case may be.

Until recently, section 42(1)(a) required a judge to serve for at least 15 years and attain the age of 65 years prior to becoming eligible to receive an annuity. However, in late 1998 the section was amended so as to delete the age 65 requirement and provide for what has been termed the "modified rule of 80".¹ Under the modified rule of 80, two criteria must be satisfied: (i) the combined age and number of years in judicial office must equal 80; and (ii) the judge must have continued in office for at least 15 years.

In her testimony before the House of Commons Committee studying the 1998 amending legislation, the Minister of Justice, the Honourable Anne McLellan, explained that the previous rule, which had required a judge to attain the age of 65 years before retirement, was perceived to be unfair to younger judges, who were required to serve much longer before

¹See S.C. 1998, c. 30, s.7, in force November 18, 1998.

qualifying for an annuity.² She explained that the proposed modified rule of 80 was designed to provide a more equitable basis for determining eligibility for a judicial annuity:

In our view, the proposed rule of 80 responds in an important way to the changing demographic profile of the judiciary. More and more judges are being appointed at a younger age, and many of these younger judges are women. The current provision, although based on the rule of 80, requires a minimum age of 65. A judge who retires before 65 has no right to a pension at all. A judge appointed at the age of 50 can retire with a pension at 65 with 15 years of service, but a judge who was appointed at 40 must serve 25 years to receive any pension at all, a situation that is increasingly considered unfair.

This situation is even more unacceptable when we consider that it has a particular impact on women judges, who constitute the majority of those appointed at an early age. The rule of 80 would allow older, long-serving judges to retire when they feel they no longer wish to continue in the role. Permitting this will be good for them and for the court itself as an institution.

The Minister also noted that consideration had been given to a more generous rule, under which judges would be permitted to retire when their combined age and years of service reached 80 regardless of how long they had served on the bench (the so-called "unencumbered rule of 80"). However, the government was not recommending the unencumbered rule of 80, and it was the modified rule of 80 that was incorporated in the statute that was enacted by Parliament in November of 1998.

3. Equity Concerns

Although the purpose of the amendment to section 42(1)(a) enacted in 1998 was to respond to concerns about the equity and fairness of the previous retirement rule, various parties to the Commission have argued that the amended rule gives rise to continuing and serious equity concerns. In particular, the submission of the Canadian Judges Conference and the Canadian Judicial Council dated December 20, 1999 (hereinafter the "Joint Submission") argues that "the current annuity scheme leads to unequal treatment amongst judges (a characteristic which raises *Charter* implications)..."³ The Joint Submission identifies a variety of *Charter* concerns with the current annuity scheme, including its impact on judges living in common law and same-sex relationships, and single judges.⁴ However, the Joint Submission also raises

²See House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence*, (36th Parliament, First Session) May 11, 1998.

³Joint Submission at p.3-2.

⁴As noted in my letter to you dated March 24, 2000, any *Charter* issues arising from the

specific concerns in relation to the alleged discriminatory impact of the modified rule of 80 on younger judges, the majority of whom are women.⁵ In particular, the Joint Submission argues that the current plan, despite the modified rule of 80, "does not provide comparable or equal benefits for comparable or equal contributions and service."⁶ The Joint Submission offers a number of examples of this lack of comparability, including the fact that a judge appointed at age 50, after serving 15 years and paying for 15 years, will receive the same 2/3 annuity on retirement as a judge appointed at age 36, who is required to serve and pay for 22 years before qualifying. Based on these examples, the Joint Submission concludes as follows:⁷

Clearly, then, younger appointees work more years and pay longer before being entitled to retire with exactly the same benefits as colleagues who may have been judges for half the same length of time.

Later, this conclusion is reinforced by pointing to the fact that women are disproportionately represented in the affected category:⁸

We submit that requiring younger appointees to work significantly longer and to pay significantly more than their older appointee colleagues, once they have met the qualifying norm of 15 years for a fully earned 2/3 annuity, raises serious equality issues. This is particularly so given the disproportionate representation of women in this affected category. For all those judges who have worked and paid contributions for at least 15 years, there is no fair reason for requiring continued contributions. Moreover, there is no logical reason for not

differential treatment of judges living in common law or same-sex relationships, as compared with married judges, will be remedied by the enactment of Bill C-23, *An Act to modernize the Statutes of Canada in relation to benefits and obligations*, which was recently approved by the House of Commons and is currently before the Senate.

⁵See the Joint Submission, p. 3-3. The evidence that was tendered in support of the proposition that the majority of younger judicial appointees are women is that the average age of women at the time of appointment in recent years has been lower than that of men. (See Appendix IV to the Joint Submission, which shows that over the past 14 years the average age of women at appointment was lower than that of men.) However, since there were more men than women appointed to the federal judiciary during this period, the fact that women's average age at appointment is lower than men's does not necessarily establish that the "majority of younger appointees" are women. On the other hand, information provided by the Office of the Federal Commissioner for Judicial Affairs establishes that this is in fact the case. See Schedule A to this memorandum, "Judicial Appointments, 1995-99 By Age and Gender".

⁶Joint Submission at p. 3-17.

⁷Joint Submission at p. 3-17.

⁸Joint Submission at p. 3-19.

providing additional benefits for the extra years worked in recognition of longer service.

The submissions to the Commission do not contain any further analysis of the equality rights concerns associated with the modified rule of 80.⁹ There is no actuarial or other analysis provided comparing the value of the benefits received by judges retiring at different ages. Nor is there any specific discussion of the recent Supreme Court of Canada jurisprudence on the interpretation of equality rights under section 15 of the *Charter* in relation to the validity of section 42(1)(a).¹⁰

4. Section 15 Test

In its recent decision in *Law v. Canada (Minister of Employment and Immigration)*,¹¹ the Supreme Court of Canada set out a three-part test for assessing potential violations of equality rights under section 15 of the *Charter*. The test consists of the following:

- (i) does a law impose differential treatment between the claimant and others, in purpose or effect, resulting in unequal treatment?;
- (ii) are one or more enumerated or analogous grounds of discrimination (i.e. those expressly identified in section 15, or grounds analogous to those expressly identified) the basis for the differential treatment?; and
- (iii) does the law have a purpose or effect that is discriminatory within the meaning of

⁹The Submissions which I have reviewed are as follows: all written submissions, appendices and replies filed by the Canadian Judges Conference/The Canadian Judicial Council; a letter from Madam Justice M.S. Paperny of the Court of Queen's Bench of Alberta, dated November 15, 1999; a letter from the Hon. D.B. Mason and eight other judges of the Court of Queen's Bench of Alberta, dated December 20, 1999; the Submission of Manitoba Justices Krindle, Beard and Hamilton, dated December 24, 1999; a letter from Judith F. MacPherson, Q.C., Chair, Standing Committee on Pensions for Judges' Spouses and Judges Salaries, dated February 22, 2000; and Transcripts of the proceedings of the Commission dated February 14, 2000 and March 20, 2000.

¹⁰ I note that a number of submissions have commented on the impact of the failure to provide for a pro-rata or deferred pension for judges who serve less than 15 years. However, in my respectful view this issue is separate and distinct from the constitutional validity of the modified rule of 80; accordingly, the issue of the absence of a pro-rata or deferred pension raises concerns that are distinct from the constitutional validity of the modified rule of 80 in section 42(1)(a) and is not addressed in this memorandum.

¹¹[1999] 1 S.C.R. 497 (hereinafter "*Law*").

the equality guarantee?¹²

All three elements of the test must be satisfied in order for a claimant to establish a violation of the equality guarantee.

With respect to the first of these factors (the 'differential treatment' inquiry), the Court has indicated that such differential treatment may arise in one of two ways.¹³ The first is for a law to expressly or on its face deny a benefit or impose a burden on a claimant as compared to others. This is known as direct discrimination. The second is where a law is facially neutral but has a disproportionate impact on a group because of the particular characteristics of that group. This second form of discrimination has been termed adverse effects discrimination. A claimant need show only that a law, rule or practice differentiates in either of these two ways in order to satisfy the differential treatment inquiry. However, the Court has also stated that in order to satisfy this part of the test, the differential treatment must arise from the law, rule or practice that is the subject of the inquiry, and not from factors or conditions that arise or exist independently in society. Thus in *Symes v. Canada*¹⁴ the Court dismissed a challenge to provisions in the *Income Tax Act (Canada)* which limited the deductibility of child care expenses for income tax purposes. While the Court accepted that women disproportionately bear the burden of child care in society, the taxpayer had not shown that women disproportionately bear the cost of child care expenses. Since it was not established that the law itself had a differential impact, the equality rights claim was dismissed.

The third element of this test, the 'discrimination inquiry', has proven particularly elusive for the courts to define. In *Law* the Supreme Court stated that a law would be held to be discriminatory when it imposed burdens or withheld benefits in a manner "...which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration".¹⁵ Amongst the 'contextual factors' that were stated to be relevant in determining whether a law 'demeans a claimant's dignity' were the following:¹⁶

- (iv) whether the claimant is associated with a historically disadvantaged group (which

¹²See *Law* at paragraphs 88 to 90.

¹³See *Law* at paragraph 88. See also *Egan v. Canada*, [1995] 2 S.C.R. 513 at paragraphs 137-138 (*per* Cory and Iacobucci JJ. (dissenting, although not on this point).)

¹⁴[1993] 4 S.C.R. 695 (hereinafter "*Symes*").

¹⁵*Law* at paragraph 88.

¹⁶See *ibid.* It should also be noted that the Court stated that no one of these factors is determinative, and the list of factors identified is not exhaustive.

will tend to favour a finding of discrimination);

- (v) whether the distinction in the law is one that fails to take into account the actual need, capacity or circumstances of the claimant as compared with others (which will likewise tend to favour a finding of discrimination);
- (vi) whether the purpose or effect of the law is to ameliorate the conditions of a more disadvantaged person or group in society (which will tend to make it more difficult to find discrimination); and
- (vii) the nature and scope of the interest affected by the impugned law (with the more severe and localized these consequences for the affected group, the more likely it will be that there is discrimination).

In *Law* it was the third element of the section 15 test which proved determinative. The Court found that federal legislation which denied survivor's benefits under the *Canada Pension Plan* where the survivor is under age 35 did not demean the claimant's dignity. The Court reasoned that the restriction did not reflect or promote the notion that younger people are less capable or less deserving of concern, respect or consideration. Rather, the restriction was based on the assumption that younger persons have greater prospect of long-term income replacement, an assumption which accords with their actual situation. Thus even though the legislation imposed differential treatment on the enumerated ground of age (and therefore met the first two elements of the section 15 test), it was not discriminatory within the meaning of the equality guarantee. In the result the section 15 claim was dismissed, making it unnecessary for the Court to consider the limitations clause in section 1.¹⁷

5. Application to section 42(1)(a) of the Act

In my view, section 42(1)(a) does not violate section 15 of the *Charter*. There are two overriding reasons which lead to this conclusion. The first is that, in my view, the modified rule of 80 does not impose differential or unequal treatment on the basis of age or gender. The second is that, even if such differential treatment were found to exist, it is likely that it would be found not to demean the human dignity of the affected class of judges and therefore would not constitute discrimination.

I will consider each of these issues in turn.

(i) *Differential or Unequal Treatment*

As noted above, the Joint Submission argues that the modified rule of 80 is

¹⁷Section 1 permits violations of *Charter* rights to be upheld where the limit is reasonable, prescribed by law, and can be demonstrably justified in a free and democratic society.

discriminatory because younger judges are required to work more years and pay longer before being entitled to retire "with exactly the same benefits as colleagues who may have been judges for half the length of time." This statement appears to be based on the assumption that an annuity of two-thirds of salary at time of retirement is "exactly the same benefit" for all recipients. Yet in order for this assumption to be true, two conditions would have to be satisfied: (A) the same dollar amounts (in constant dollars) would have to be paid to all recipients; and (B) the payments would have to continue for exactly the same length of time.

Under the modified rule of 80 in section 42(1)(a) neither of these conditions holds. First, although the formula for calculating the annuity is the same, namely, two thirds of salary at retirement, since judges who enter the plan at different ages will retire at different points in time, their salaries at retirement (and thus the dollar amount of their annuity) will differ. In particular, those who retire later will have a higher salary at retirement for purposes of the annuity calculation. Second, because judges will be eligible to retire at different ages depending upon their date of entry into the plan, their respective life expectancies (as well as the life expectancies of survivors) will differ. In particular, judges appointed at younger ages will be eligible to retire earlier and thus they and their survivors, if any, will receive benefits for a longer period of time than judges appointed at a later age. Furthermore, since women generally have longer life expectancies than men, annuities payable to female judges will generally be paid for a longer period than those to male judges appointed at precisely the same age, even though they have both contributed the same 7% of salary towards the cost of the annuity.

The impact of these various factors on the relative benefits and burdens of the judicial annuity scheme is illustrated in an analysis of the scheme, undertaken at the request of the Commission, by Mr. L. M. Cornelis of the Office of the Chief Actuary of Canada. (Mr. Cornelis' report is attached as Schedule B to this memorandum.) The following calculations were requested:

- (a) the actuarial present value of a judicial annuity at the time of receipt;
- (b) the actuarial present value of the contributions of a judge towards that annuity at the time of receipt; and
- (c) the ratio of ii) to (i).¹⁸

The Chief Actuary was asked to undertake these calculations in respect of both male and female judges appointed at the ages of 40, 45, 50, 55 and 60, respectively,¹⁹ and to assume that they

¹⁸See letter dated March 21, 2000 from Mr. Richard Drouin to Mr. David Sgayias, requesting the Government of Canada to obtain this information from the Office of the Chief Actuary.

¹⁹In the last five years, 276 of the 291 federal judicial appointees fell within these age ranges. During this period, there were two judges appointed at an age under 40 (one male and

would retire at the earliest opportunity to receive a full annuity under the terms and conditions set out in the *Act*.

In subsequent discussions, the Chief Actuary was also asked to calculate what is termed the 'normal cost' for these annuities, namely, the uniform percentage of salary that would have to be contributed in each year by judges appointed at these different ages in order to fund the annuity provided upon retirement. Finally, the Chief Actuary was also asked to undertake the same calculations for DM 3s in the Government of Canada. In particular, the Commission requested the present values and ratios corresponding to those calculated in respect of judicial appointees, by gender and by the same age of appointment, taking into account the Special Retiring Allowance provisions which should be assumed to apply to these hypothetical Deputy Ministers.²⁰ The response was provided in the form of a letter dated April 14, 2000 from Mr. L.M. Cornelis of the Office of the Chief Actuary of Canada to Mr. D. Sgayias of the Department of Justice, attached as Schedule B hereto.

In order to undertake these calculations, it is necessary to make a series of economic assumptions, including assumptions respecting future interest rates, future increases in the consumer price index, and future increases in the Industrial Aggregate index.²¹ It is also necessary to make certain demographic assumptions, such as assumptions as to the life expectancy of members of the plan at various retirement ages, the proportion of retiring judges who will leave a survivor and/or children eligible to receive an annuity, as well as the life expectancy or entitlement period of these other beneficiaries.

Since these assumptions are predictions of future events which may or may not

one female) and 13 judges (all male) appointed at age 60 or more. See the data set out on Schedule A.

²⁰The Special Retiring Allowance applies to approximately 30 Deputy Ministers who head a government Department. These individuals are permitted to accrue benefits, in addition to those available to other senior executives in the public service, at a rate of 2% per year of service, to a maximum of 10 years. The effect of this plan is to allow the Government to recognize years of service as a Deputy Minister as being worth twice their face value in pension credits. The Special Retiring Allowance was introduced following the recommendation of the Advisory Group on Executive Compensation in 1988. See Responses to Requests Provided by the Government of Canada to the Judicial Compensation and Benefits Commission (March 31, 2000) at p. 6 and Appendices 49 and 50.

²¹See Michael Hafeman, (Acting Chief Actuary, Public Insurance and Pension Programs), *Actuarial Report as at 31 March 1998: Pension Plan for Federally Appointed Judges* (Office of the Superintendent of Financial Institutions, Government of Canada, April 9, 1999) at pp. 8-15 (hereinafter "*1998 Actuarial Report*"). The Industrial Aggregate index, maintained by Statistics Canada, measures the average earnings of employed Canadians. This index is used to calculate salary adjustments for judges under the *Act*.

occur as expected, there is no single set of assumptions which can be deemed to be 'correct'.²² Therefore, as discussed in his letter to Mr. Sgayias, Mr. Cornelis has undertaken the calculations requested on the basis of three different sets of assumptions, presented in his report as Basis I, Basis II and Basis III. The Basis I calculation reflects the assumptions used to value the annuity scheme for judges in the *1998 Actuarial Report*.²³ The Basis II calculation uses assumptions that are broadly similar to those in Basis I, except that a uniform interest rate of 6 per cent for the entire calculation period is used.²⁴ The Basis III calculation assumes an interest rate of 7.25% throughout the calculation period.

Given the fact that no single set of economic and demographic assumptions can be shown to be inherently or necessarily correct, and that the use of different assumptions will affect the relative valuations of both judicial contributions and annuities payable, one might question whether these actuarial valuations reflect the 'true' value of the relative burdens and benefits of the plan. The answer to this concern is that these valuation methods represent the best available methodology for valuing pension liabilities and entitlements, and are statutorily authorized for all public pension plans.²⁵ I also note that the Joint Submission seems to accept the validity and appropriateness of such a valuation methodology, albeit in a slightly different context.²⁶

The Chief Actuary was requested to assume that judges will retire immediately upon becoming eligible for a 2/3s annuity. Material tendered to the Commission indicates that judges generally work beyond the point at which they are first eligible for a full annuity, with the average retirement age being 72 years. Thus the calculations that were requested will not reflect the actual values of contributions or entitlements for the vast majority of judges, since judges tend to work longer and to contribute more towards their annuities than is suggested in the

²²For this reason the *Public Pensions Reporting Act*, R.S.C. 1985, c. 13 (2nd Supp.) does not prescribe a uniform set of assumptions but, rather, requires the Chief Actuary to identify the assumptions that are used.

²³See *1998 Actuarial Report*, at p.11 for a summary of the assumptions used.

²⁴Basis I assumes an interest rate of slightly over 9 per cent in year 2000, declining gradually to 6 per cent by the year 2023, after which time it remains constant at 6%.

²⁵See the *Public Pensions Reporting Act*, above.

²⁶See Joint Submission at p. 3-36 (requesting that single judges be entitled to receive an amount "equal to the actuarial equivalent of a spousal annuity, calculated assuming the deceased judge had been married to a person of the same age.") The issue of the appropriateness from a constitutional perspective of such a payment to single judges is not addressed in this memorandum; the reference to this aspect of the Joint Submission is intended merely to indicate the appropriateness of valuing judicial annuities on the basis of actuarial valuations involving assumptions as to future contingent events.

calculations requested of Mr. Cornelis. (The difference is reflected in a separate worksheet prepared by Mr. Cornelis, which focuses on a typical judge appointed at age 50 and retiring at age 72. This worksheet is attached as Appendix A-IV to his report.) However, the request to the Chief Actuary was structured in this particular way in order to identify any inequities which arise by virtue of the legislation itself, as opposed to from the voluntary choices of individual members. In other words, to the extent that an individual chooses to continue working beyond the age at which he or she is eligible to retire with a full annuity, thereby working for a longer period or contributing more before collecting the annuity, this is a result of that individual's voluntary choice, and cannot serve as the basis of an equality rights claim.²⁷

The Basis I worksheet for judicial annuities prepared by Mr. Cornelis, based on the assumptions used in the *1998 Actuarial Report* prepared under the *Public Pensions Reporting Act*, is labeled Appendix A-1 to his April 14, 2000 letter. The following aspects of Appendix A-1 are of particular interest:

- (A) all of the judges in the calculation are assumed to be appointed on April 1, 2000 at the various ages indicated under the column "Entry age";
- (B) judges who are appointed at ages ranging from 40 to 60 will be eligible to retire at ages ranging from 60 to 75, in accordance with the modified rule of 80;
- (C) the earliest eligible to retire will be those appointed at ages 50, 55 and 60, who will all be eligible to retire in the year 2015; those appointed at ages 45 and 40 will be eligible to retire in the years 2017 and 2020, respectively;
- (D) the annuities payable will vary, since salaries will be different in the years 2015, 2017 and 2020. Those retiring later are assumed to have higher salaries at retirement and thus a higher annuity in nominal dollars;
- (E) the present value of the annuity payable upon eligibility for retirement will vary by age. Thus, those judges who are older at appointment will have a lower annuity and a shorter life expectancy than those appointed at a younger age. The difference in value is considerable, ranging from a high of approximately \$5 million for judges (both male and female) appointed at age 40, to a low of approximately \$2.6 million for judges appointed at age 60;
- (F) the accumulated contributions of the judges fund a relatively similar proportion of their total benefits, ranging from a low of 11.2 per cent for a male appointed at age 50 to a high of 15.4 per cent for males and females appointed at age 60;
- (G) the 'annual normal cost' (the uniform percentage of salary that would need to be contributed in each year to fund the annuity entitlement) ranges from a low of 45.4 per cent for judges appointed at age 60 to a high of approximately 62 per

²⁷See the discussion of the *Symes* case, above.

cent for judges appointed at age 50;

- (H) female judges are assumed to live longer than male judges and thus the present value of their individual annuities (considered without regard to the value of a survivor's annuity) is uniformly higher in all age groups; however the life expectancies of survivors of male judges are assumed to be longer, which has the effect of increasing in relative terms the value of the total annuity attributable to male judges to a level that is broadly similar to the value of the total annuity attributable to female judges.

As noted above, different economic and/or demographic assumptions produce different valuations. The Basis II worksheet prepared on the basis of an assumed interest rate of 6% (Appendix A-II to the Cornelis April 14 letter) produces different salaries at retirement and thus different annuities. This, in turn, alters the present value calculations and the ratios of contributions to benefits. Similar differences are evident in relation to the Basis III worksheet, prepared on the basis of an assumed interest rate of 7.25%. However, while the absolute and relative valuations differ from one Basis to the other, the findings as set out above remain constant.

The Chief Actuary was asked to undertake the identical calculations for the pension contributions and entitlements of Deputy Ministers at the DM-3 level, who are to be assumed to be eligible for the Special Retiring Allowance.²⁸ The calculations in respect of the DM-3 class are set out on the worksheets labeled Appendices B-I to B-III (which show the results for the DM-3 primary pension only) and Appendices C-I to C-III (which show the results for the total pension package, including any survivor pension that might eventually become payable). These worksheets show that the present value of the contributions of DM-3s generally represent a slightly higher proportion of their pension entitlements, while their normal costs are generally lower.

What are the relevant conclusions that emerge from these worksheets in terms of an equality rights claim directed at the modified rule of 80 under section 42(1)(a)?

First, these figures demonstrate that the value of a judicial annuity varies with the age and gender of the appointee. However, it is incorrect to claim that younger appointees (whether male or female) work longer and contribute more in order to receive exactly the same benefit as is provided to older appointees. For example, the Basis I calculation indicates that a 40 year old appointee is entitled to receive an annuity that has a present value (in constant 2015 dollars) of about \$4.3 million,²⁹ which is approximately 19 per cent more than the annuity

²⁸See note 20 above. Not all DM-3s are in fact eligible for the Special Retiring Allowance, since it is only provided to those Deputy Ministers who are heads of government Departments.

²⁹In comparing the present value of the annuity payable to the 40 year old appointee with

payable to a 50 year old appointee (\$3.6 million) and approximately 63 per cent more than the annuity payable to a 60 year old appointee (about \$2.64 million). These differences are a result of a combination of factors, the most important of which are that the annuity of a younger appointee will be higher at retirement (since they will retire later, at which point salaries will have increased) and he or she will be entitled to receive the annuity for a longer period of time (since he or she is eligible to retire at a younger age). Thus, the judicial annuity scheme provides for a correlation between a member's contributions and years of service and the value of entitlements he or she receives under the plan.

Second, far from discriminating against female appointees, the current plan benefits such appointees at all age levels since they will live longer (and thus collect benefits for a longer period of time) and yet make the same 7 per cent contribution toward their annuity.

One issue that bears particular discussion is the fact that the various worksheets prepared by Mr. Cornelis indicate that the precise ratio of contributions to benefits is not identical for all age groups within the plan. In particular, the contributions of those appointed at the youngest and oldest ages (i.e. ages 40 and 60) tend to represent a slightly higher proportion of their total benefit than is the case for those appointed between ages 45 to 55. Moreover, the annual normal cost needed to fund the annuities of the 40 and 60 year old appointees is slightly lower than the comparable cost for the annuities of those ages 45 to 55 at appointment. Could these discrepancies in the ratios of contributions to benefits, and in normal service costs, serve as the basis for an equality rights claim by either the 40 year old or 60 year old appointees?

In my view, a constitutional challenge mounted on this basis is unlikely to succeed, for a variety of reasons.

First, all defined benefit pension plans (in contrast to defined contribution pension plans) exhibit similar discrepancies in the ratio of benefits to contributions, and in normal costs, for entrants at different ages. This reason for this (as is explained in a separate letter dated April 18, 2000 by Mr. Cornelis and attached as Schedule C hereto) is that entitlements under defined benefit plans are calculated according to a formula that is generally tied or linked to years of service and salary levels, rather than on the basis of the accumulated value of the members' contributions. (In contrast, a defined contribution plan provides benefits that are expressly linked to contributions.) While there will often be some rough approximation between contributions and entitlements under a defined benefit plan (since members who enter at an earlier age, and who will be entitled to a higher defined benefit, will also contribute more), it would in practice be impossible for the ratio of contributions and entitlements to be precisely identical for all members. It is for this reason that in both the judicial annuity and DM-3 pension plans, the ratio

that payable to the 50 or 60 year old appointee, it is appropriate to take account of the fact that the annuity of the 40 year old appointee will not be payable until the year 2020, whereas the annuities of the other appointees will commence in the year 2015. Therefore the 40 year old's annuity of \$5.3 million in 2020 dollars was discounted using a 3 per cent inflation rate, to produce an annuity with a present value of \$4.3 million in 2015 dollars.

of contributions to benefits varies slightly by age of entry to the plan. Moreover, and this is the significant point, any alternative basis for determining eligibility for an unreduced judicial annuity would also contain a variance in these ratios (although not necessarily identical to or in precisely the same pattern as those set out in the worksheets prepared by Mr. Cornelis.) For example, the unencumbered rule of 80, which was proposed by the Canadian Judicial Council as a replacement for the modified rule of 80, would enhance the present value of annuities for older appointees, who would be permitted to retire at an earlier age and thus collect their annuities for significantly longer periods of time. The effect of this rule would not be to equalize the ratios of contributions to benefits, but to substitute different ratios for those that currently exist. Thus the fact that the current judicial annuity scheme fails to provide for precisely identical ratios between contributions and benefits for entrants at all ages is a characteristic shared with defined benefit pension plans generally.

There are other considerations which lead to the conclusion that the ratio of contributions to benefits need not be identical for entrants at various ages. These considerations can be summarized as follows:

- (I) since there is no single set of 'correct' economic or demographic assumptions, even if the ratios of contributions to benefits were precisely identical for all entrants under one set of assumptions, the calculations would differ under a different set of assumptions;
- (II) the present value calculations set out in Mr. Cornelis' worksheets do not represent the benefits that will actually or necessarily be received by the judges appointed at the various ages indicated. Rather, they represent estimates of what judges who retire at a certain age will likely receive, based on average life expectancy at age of retirement. But no-one is guaranteed a payment of an annuity worth a certain dollar amount. This is because annuities under the *Act* are payable for the life of the judge and the survivor, if any. Thus the actual value of the benefit received by two judges who retire at precisely the same age and on the same day will almost certainly turn out to be different, since chances are that they (and their survivors, if any) will live for different periods. Thus it is unclear what purpose would be served by constitutionally requiring that the ratios between accumulated contributions and the present value of annuities be identical for all age groups, since these calculations reflect estimates only rather than amounts that will necessarily be received.

Thus I conclude that the modified rule of 80 does not impose unequal treatment on younger appointees. Younger appointees will tend to receive a higher annuity for a longer period of time than older appointees, reflecting their longer service and higher contributions. While the precise ratios between contributions and expected benefits are not identical for judges appointed at different ages, they are broadly similar. Moreover, there is no constitutional obligation that such ratios be identical for all age groups. Thus section 42(1)(a) of the *Act* does not impose unequal treatment, as required under the first stage of the *Law* test.

Even if my analysis to this point were found to be in error, there is a further and separate reason which in my view would make it unlikely that an equality rights claim would be found to satisfy the first stage of the *Law* test.

Section 42(1)(a) only applies to those who elect to be subject to its terms, namely, those who apply for, are offered, and accept a judicial appointment. In effect, no one is compelled to become a judge at a particular age. (In fact, judicial appointments are highly sought after, as is reflected by the large number of applicants for the limited positions available.³⁰) If, therefore, (contrary to the analysis outlined above) an individual were to come to the view that the judicial annuity scheme is discriminatory towards younger appointees, he or she could avoid such discrimination by simply postponing applying to the bench until a later date. As described earlier, *Symes* makes plain that equality claims can only be successful in the context of inequalities that result directly or indirectly from the terms of legislation, rather than from the independent choices of individuals affected by the legislation. The inequality must be imposed by the law. Thus, to the extent that unequal treatment of younger appointees arises from the voluntary decision of those appointees to seek judicial appointment, this would tend to defeat the claim at the first stage of the *Law* analysis.

Counsel for the Canadian Judges Conference/ Canadian Judicial Council took the position that the date of a judicial appointment is determined by the Governor in Council and not by the appointee.³¹ Therefore, in counsel's submission, it could not be said that the appointee had voluntarily chosen to become a member of the judiciary at a certain age.

The current process for judicial appointments is described in a document prepared by the Minister of Justice and Attorney General for Canada.³² All candidates wishing to be considered for appointment must apply to the Commissioner for Federal Judicial Affairs. Most candidates are required to be assessed by the appropriate judicial appointments advisory committee.³³ The assessments, when completed, are valid for a period of two years. After the expiry of the two-year period, a candidate is required to indicate that they continue to be

³⁰See Appendix 11 to the Submission from the Government of Canada to the Judicial Compensation and Benefits Commission, December 20, 1999.

³¹See Judicial Compensation and Benefits Commission, Hearing of March 20, 2000.

³²See Government of Canada, *Federal Judicial Appointments Process* (June 1999) (hereinafter "*Judicial Appointments Process*").

³³Current judges are not assessed by the advisory committees. However, only 11.2% of appointments in the 1990-99 period were elevated from other judicial posts. See Appendix 10 to the Submission from the Government of Canada to the Judicial Compensation and Benefits Commission, December 20, 1999.

interested in an appointment and wish to be re-assessed by the advisory committee.³⁴ Thus, while it is true that the Governor in Council determines the precise date of a judicial appointment, it is the candidate who determines the relevant two-year period or 'window' in which such an appointment can be made. In this sense, the age at which an individual is appointed to the bench is within the significant control of the appointee.

Nor would this conclusion differ even if it could be demonstrated that the government of Canada had made particular efforts to recruit younger female candidates for the bench. Assuming such 'targeted recruitment' had taken place, the fact would remain that the decision as to whether or not to allow one's name to stand for consideration, and ultimately to accept an offer of appointment, would remain that of the candidate. Thus active encouragement to allow one's name to stand could not be said to vitiate the voluntariness of the candidate's decision to seek and accept a judicial appointment.

Given the other arguments discussed in this opinion, it is not necessary for me to express a firm view as to whether this particular consideration alone would be decisive in the context of an equality rights challenge to the modified rule of 80 in section 42(1)(a) of the *Act*. The fact that candidates for judicial office have significant control over the age at which they are appointed would certainly be an important consideration in a section 15 case, one that would tend to reinforce the conclusion that section 42(1)(a) does not impose unequal treatment upon younger judicial appointees.

(ii) *Discrimination*

Even if, contrary to the analysis thus far, a claimant could demonstrate that the eligibility criteria in section 42(1)(a) impose an unequal burden on younger appointees, and that such a burden results from the terms of the legislation rather than from the voluntary choice of the appointee, there is an additional hurdle that would be necessary to overcome in order for the section 15 claim to succeed. This additional hurdle is the requirement that the unequal treatment be found to be 'discriminatory'.

As the recent Supreme Court decision in *Law* pointed out, it cannot simply be assumed that laws which impose unequal burdens based on an enumerated or analogous ground will be found to be discriminatory. In order to establish discrimination, it is necessary to demonstrate that the legislation demeans the human dignity of the claimant or the class of persons of which the claimant is a member.

In the *Law* case itself the claimant was challenging a provision which denied survivor benefits under the *Canada Pension Plan* to those under the age of 35. In finding that this denial was not discriminatory, the Supreme Court relied upon statistical data which tended to show that younger persons generally were more likely to successfully re-enter the labour market after the death of a spouse. The legislation was based on what the Court termed "informed

³⁴*Judicial Appointments Process* at p.4.

statistical generalizations" even though those generalizations "may not correspond perfectly with the long-term financial need of all surviving spouses."³⁵ In other words, even though this particular individual claimant may not have been able to achieve successful re-entry into the labour market, her dignity was not demeaned since individuals in her position were generally more likely to achieve successful re-entry than were older individuals. The Court also placed weight on the fact that the claimant in the case would eventually be eligible for a pension at age 65:

I would also note that people in the position of the appellant are not completely excluded from obtaining a survivor's pension, although it is delayed until the person reaches age 65 unless they become disabled before then. The availability of the pension to the appellant strengthens the conclusion that the law does not reflect a view of the appellant that suggests she is undeserving or less worthy as a person, only that the distribution of the benefit to her will be delayed until she is at a different point in her life cycle, when she reaches retirement age.³⁶

Conversely, in those cases where an equality rights claim has succeeded, it has generally involved a complete denial of access to an opportunity or benefit, as opposed to a limited or partial denial of a benefit.³⁷

Applying this reasoning to the criteria in section 42(1)(a) of the *Act*, it seems highly unlikely that such criteria would be found to be discriminatory.

First, the judicial annuity scheme clearly confers a significant benefit to all participants, regardless of age or gender. The comparison with the pension entitlements of DM-3s set out in the worksheets prepared by Mr. Cornelis is instructive in this regard. Recall that the DM-3 calculations assume that the members are eligible to receive the Special Retiring Allowance, which is available to only approximately 30 Deputy Ministers who head a government Department. Thus the DM-3 plan represents one of the most advantageous pension plans available in the public service. Yet the benefits associated with the judicial annuity plan are clearly superior to those under the DM3 plan, both in terms of the ratio of contributions to benefits as well as in terms of normal service cost.

This is not a case in which a claimant would be able to demonstrate that they were being totally denied a benefit or opportunity that was being made available to other classes of persons. Rather, the claim would be based on the fact that the relative entitlements of younger or older judges were marginally less attractive, considered on a present value basis, than those available to judges who were appointed at ages 45 to 55. It is difficult to characterize such a

³⁵ *Law* at paragraph 106.

³⁶ *Law* at paragraph 107.

³⁷ See, for example, *M. v. H.*, [1999] 2 S.C.R. 3; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

marginal difference in treatment as demeaning the human dignity of these younger or older judges, particularly since they are participating in a pension plan that is significantly more attractive than that available to the vast majority of other Canadians. Their situation bears no close similarity to the kinds of claims which have succeeded under section 15 of the *Charter*.

Also relevant in this context are certain comments with respect to the pension scheme for superior court judges in the pre-*Charter* case of *The Queen v. Beauregard*.³⁸ In *Beauregard*, a Quebec Superior Court judge had challenged the constitutional validity of a provision in the *Judges Act* requiring him to make contributions towards the cost of his annuity. In rejecting that challenge the majority opinion, written by Chief Justice Dickson, noted that the requirement to contribute towards the costs of pensions was "in accordance with standard, widely used and generally accepted pension schemes in Canada."³⁹ He also commented that there had been "no discriminatory treatment of judges" and that "contributory pension schemes are now widespread in Canada"; the effect of requiring judges to contribute to the cost of their pensions "merely moved superior court judges into the mainstream of Canadian pension schemes."⁴⁰

Although these comments were made in the context of a pre-*Charter* case, in my view Chief Justice's Dickson's analysis of whether there was any 'discrimination' inherent in the judicial pension scheme would certainly be relevant in the context of a s.15 challenge. Chief Justice Dickson suggests that in assessing whether a provision in the judicial annuity scheme is discriminatory, it is relevant to consider the scheme in light of pension entitlements available to Canadians generally. Where the judicial annuity scheme incorporates elements that are "in accordance with widely used and generally accepted pension schemes in Canada", it will be more difficult to establish a claim of discrimination.

Not only is the judicial annuity scheme based on elements that are widely used and generally accepted in pension plans in Canada, the scheme provides for benefits that are considerably more attractive than those available to the vast majority of other working Canadians. This suggests that it is extremely unlikely that the judicial annuity scheme could be successfully attacked on the grounds that it is discriminatory.

Also relevant in this regard is recent litigation in New Brunswick involving the constitutionality of the judicial annuity scheme for provincial court judges in that province. In *Mackin v. New Brunswick (Minister of Finance)*,⁴¹ the constitutionality of certain aspects of the

³⁸[1986] 2 S.C.R. 56. Although decided in 1986, the case was based on the law as it existed prior to the *Charter*.

³⁹*Ibid* at p.77.

⁴⁰*Ibid* at p.78.

⁴¹[1998] N.B.J. 267 (Q.B.). See also the companion case of *Rice v. New Brunswick*,

judicial annuity scheme was challenged on the basis of interference with a judge's financial security. In particular, the following aspects of the judicial annuity scheme were challenged:

- (A) the fact that judges were required to continue to make contributions towards their annuity after they qualified for retirement with a full annuity;
- (B) the fact that the pension scheme did not allow for an increased annuity upon retirement despite these continued contributions; and
- (C) the fact that a formula which integrated the judicial annuity with benefits available under the *Canada Pension Plan* had the effect of reducing a long-serving judge's annuity to a greater extent than that applicable in respect of judges who had served for a shorter time.

In *Mackin* the plaintiff did not raise any section 15 arguments in relation to these features of the judicial annuity scheme. Nor did the plaintiff raise any constitutional objection to the criteria which determined eligibility for a pension.⁴² However, it is apparent that the plaintiff's constitutional concerns, which involved a comparison of the relative benefits available to judges based upon their years of experience, bore certain broad similarities with the arguments that have been considered in this memorandum.

Mr. Justice Deschênes of the Court of Queen's Bench dismissed the challenge to these so-called 'anomalies' in the judicial annuity scheme. He reasoned that the judicial annuity scheme could not be said to violate judicial independence since the scheme provided benefits that were generous in comparison to those available to judges in other provinces or to the public generally.⁴³

The pension provisions for Provincial Court judges in New Brunswick do contain certain anomalies, most of them related to the fact that salary increases for those judges have practically been non-existent for a number of years. The pension scheme, however, is designed to attract competent persons to the bench and is in fact a generous pension scheme compared to others accorded to judges in most other provinces in particular and to the public in general whether in the public or private sector. Quite frankly, I fail to see how the obligation to continue contributions to the pension fund upon electing supernumerary status without a corresponding increase in benefits at retirement age or the fact

[1998] N.B.J. No. 266 (Q.B.).

⁴²The New Brunswick scheme permitted provincial court judges who had attained the age of 65 and served for at least ten years to retire with an annuity equal to 60 per cent of their salary at retirement. In addition, judges between the ages of 60 and 65 who had served for at least 25 years were also permitted to retire with a full annuity.

⁴³[1998] N.B.J. 267 at paragraphs 45-46.

that longer serving judges may, under certain circumstances, turn out to be entitled to pension benefits of a lesser amount than colleagues with shorter judicial careers can be looked upon as a violation of one of the essential conditions or guarantees of judicial independence.

The pension scheme adopted by the Province in the late 60's for Provincial Court judges is not unconstitutional in spite of the identified "anomalies". On the pension scheme as a whole, I share the views of counsel for the defendant that what has been suggested in relation to the pension plan for federal judges, namely that "any perception of inequitable treatment is surely tempered by the benefits for the annuitant under the present arrangement" applies here.

The New Brunswick Court of Appeal affirmed the trial judge's decision that the judicial pension scheme was not unconstitutional, but referred the issue of these 'anomalies' in the scheme to a newly-created Judicial Remuneration Commission "for debate and consideration".⁴⁴

The New Brunswick courts in this litigation adopted the same general approach as in *Beauregard*, namely, to compare the judicial annuity scheme to the pension entitlements available to Canadians generally. Because this comparison indicated that the judicial annuity scheme was relatively generous, it could not be overturned on constitutional grounds. Even though this analysis was presented in the context of a challenge to judicial independence rather than under section 15 of the *Charter*, I regard both the reasoning and the result as indicative of the general approach that would likely be applied in the context of a section 15 challenge.

I conclude, therefore, that it is unlikely that any unequal treatment of younger or older judges would be found to be discriminatory, within the meaning of section 15 and as propounded in *Law*.

(ii) Section 1

Even if, contrary to the analysis thus far, a court were to find the criteria in section 42(1)(a) of the *Act* to be a violation of section 15 of the *Charter*, it would still be necessary to determine whether such a violation could be upheld as a reasonable limit under section 1. Since I believe that the claim would be almost certain to fail under section 15, I will not devote any significant analysis to the section 1 issue. It is important to note, however, that in *McKinney v. University of Guelph*,⁴⁵ the Supreme Court found that mandatory retirement provisions violated section 15 on grounds of age, and yet could be justified under section 1. In the section 1 analysis, the Court was extremely deferential to the legislature, noting that determinations on issues relating to retirement benefits and entitlements were extremely complex and were therefore not

⁴⁴See *Rice v. New Brunswick*, [1999] N.B.J. No. 543 (C.A.) per Ryan J.A. (Drapeau J.A. concurring) at paragraph 52.

⁴⁵[1990] 3 S.C.R. 229.

susceptible to close judicial supervision.

I expect a similar caution would be exhibited by a court confronted by a claim that section 42(1)(a) of the *Act* represents a rights violation that cannot be justified under section 1. This is because such a finding in relation to section 42(1)(a) could have broad repercussions in terms of numerous other defined benefit pension plans. If, for example, a court were to find the judicial annuity scheme to be unconstitutional on the basis of the discrepancies between the ratio of contributions to entitlements for judges appointed at different ages, this could call into question the validity of numerous other defined benefit pension plans in the public sector. This is because these other plans exhibit similar discrepancies. Thus, in my view, it is likely that a court would find any section 15 violation in relation to section 42(1)(a) to be justified under section 1.

CONCLUSION

For the reasons described herein, in my view the criteria for retirement benefits set out in s. 42(1)(a) of the *Act*, and, in particular, the "modified Rule of 80" which it establishes, would likely be found not to violate section 15 of the *Charter*. Moreover, in the event that such a violation were to be established, it is likely that it would be upheld as a reasonable limitation that can be demonstrably justified in a free and democratic society, under section 1.

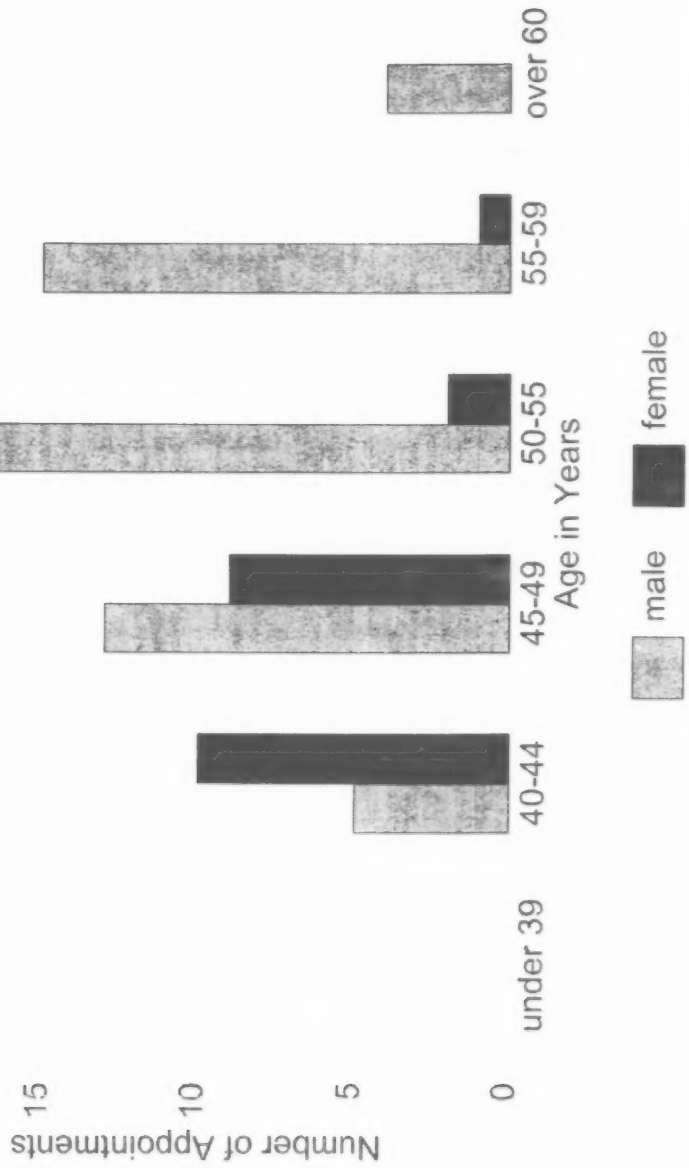
I would be happy to elaborate on any of the matters discussed herein at your convenience.

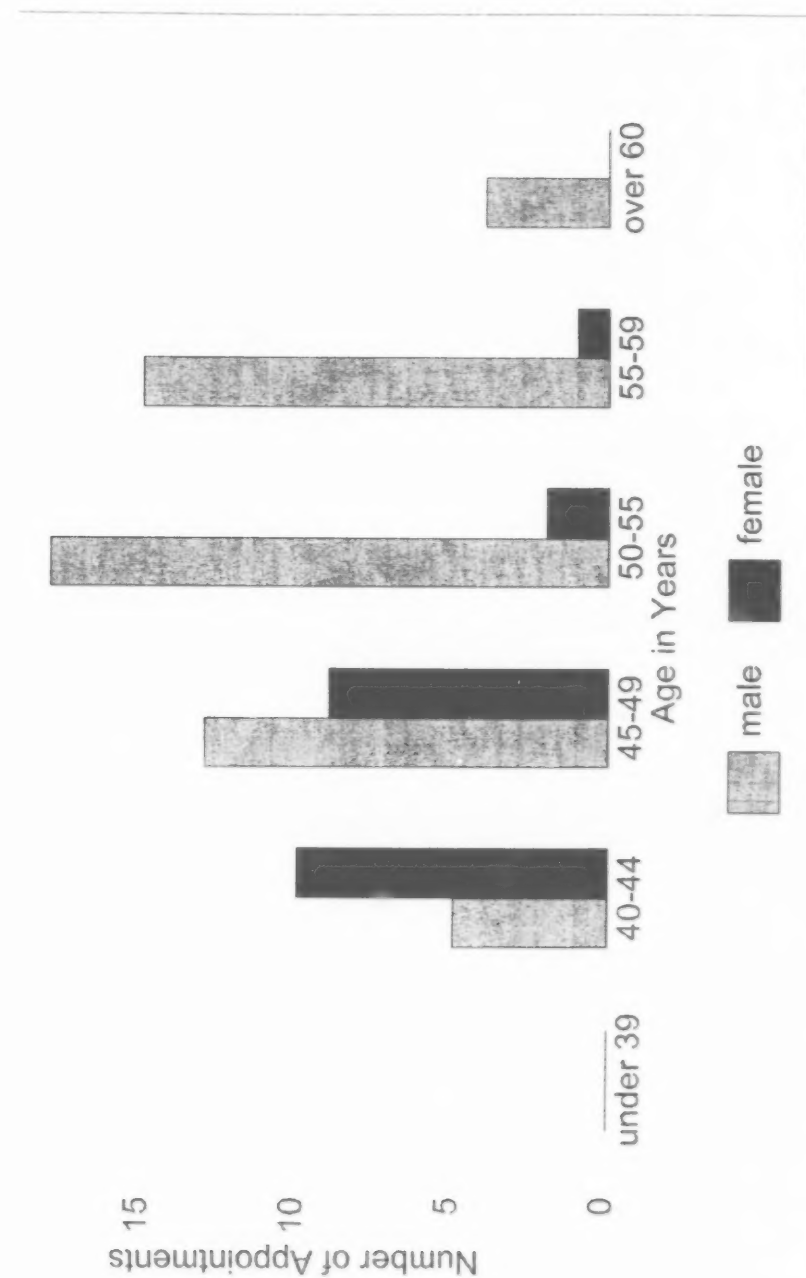
Yours very truly,

Patrick J. Monahan
Professor of Law

Judicial Appointments, 1995-1999
By Age and Gender

Year	Male							Female							total
	39	40-44	45-49	50-54	55-59	60 +	total male	39	40-44	45-49	50-54	55-59	60 +	total female	
1995	0	5	13	18	15	4	55	0	10	9	2	1	0	22	77
1996	1	2	10	10	4	0	27	1	8	7	1	1	0	18	45
1997	0	1	8	8	3	3	23	0	3	11	2	0	0	16	39
1998	0	1	12	8	15	2	38	0	0	9	8	0	0	17	55
1999	0	0	9	19	9	4	41	0	5	16	13	0	0	34	75
total	1	9	52	63	46	13	184	1	2652	26	2	0	107	291	





Number of Appointments

15

10

5

0

under 39

40-44

45-49

50-55

55-59

over 60

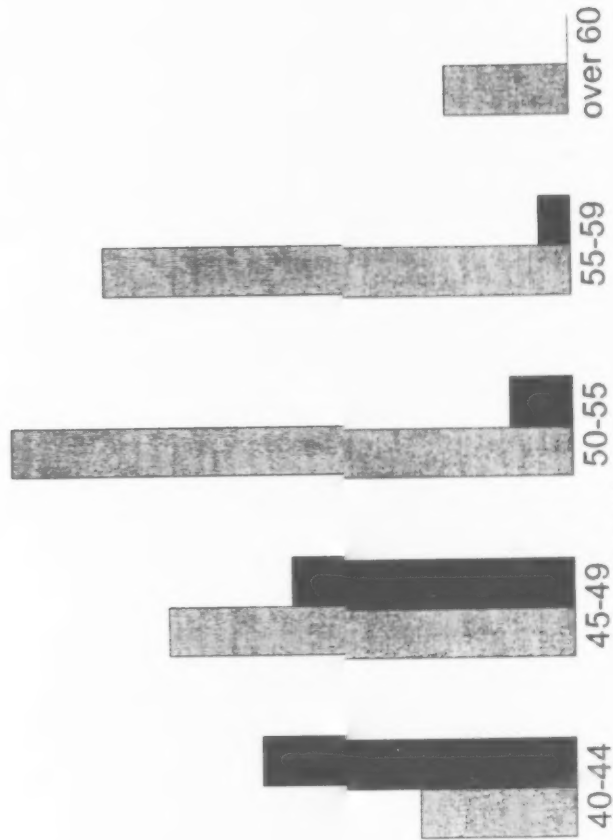
Age in Years

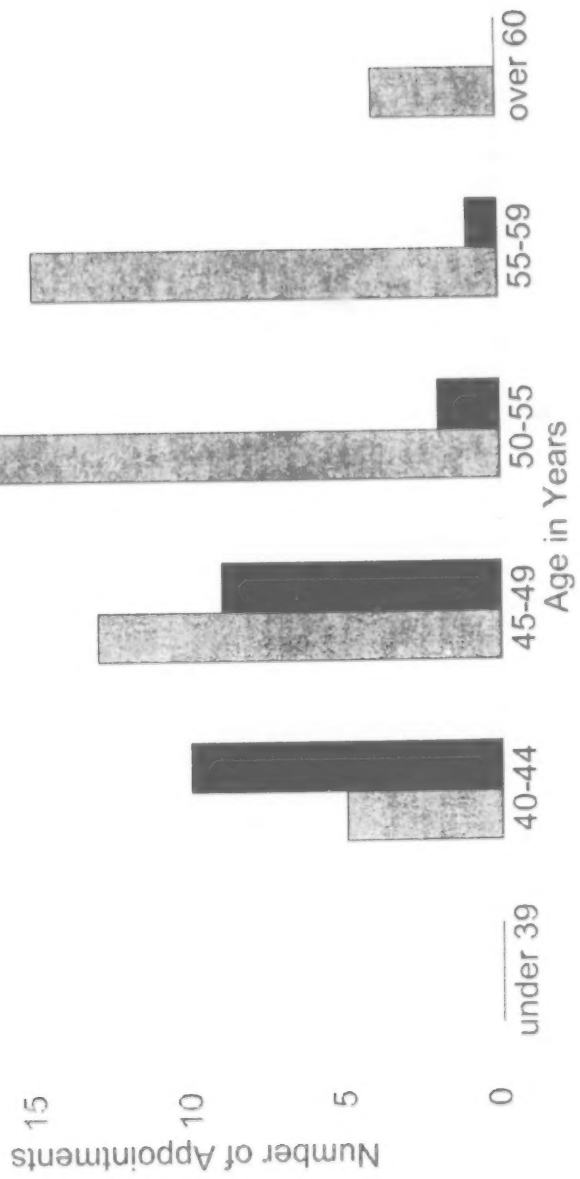


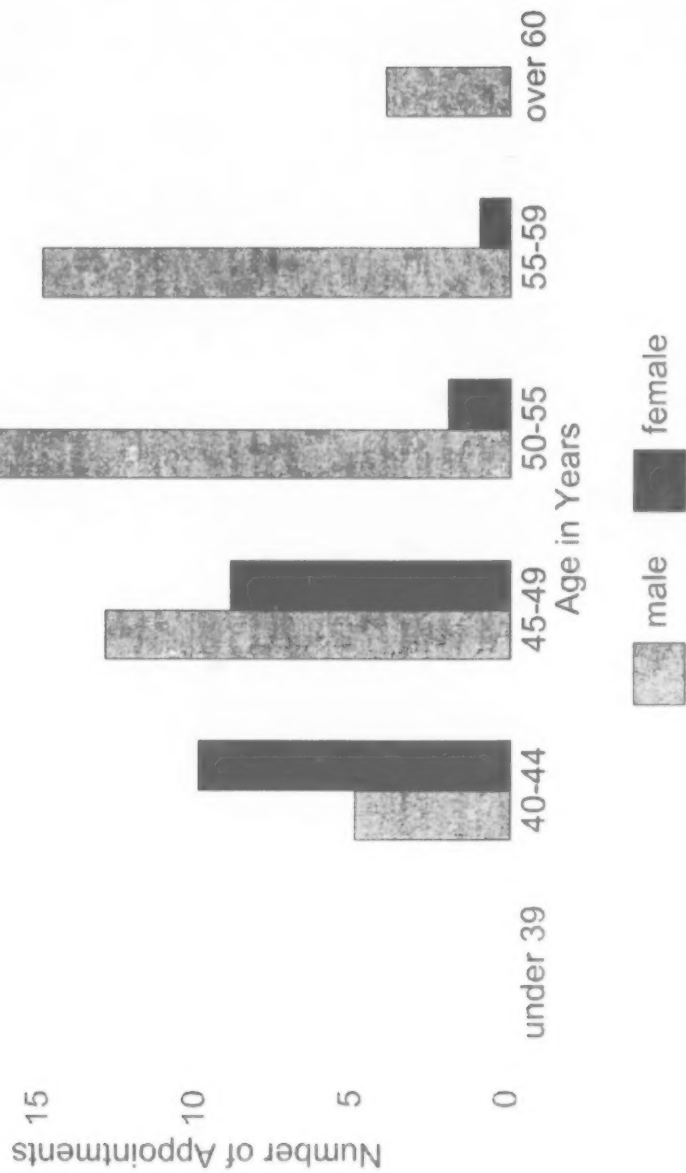
male



female







Our File: P6120-5

14 April 2000

Mr. D. Sgayias, Q.C.
Senior General Counsel, Civil Litigation Section
Department of Justice
Room 2371
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear David:

Subject: Judicial Pensions

The purpose of this letter is to respond to the requests made in the 21 March letter from Mr. Drouin, Chairperson of the Judicial Compensation and Benefits Commission, and clarified in subsequent correspondence and telephone conversations.

A. Analysis of Judicial Pensions

The first request was for the proportion of the value of a judicial pension that is funded by the judges' own contributions of 7% of salary. Appendix A-I shows the proportion for the various age-sex combinations that were requested, all done on actuarial Basis I as defined in my 20 January letter. Appendices A-II and A-III are the same except that they are based on actuarial Bases II and III, respectively. Appendix A-IV is similar except that it focuses on a typical judge appointed at age 50 and retiring at age 72.

It should be noted that all of the normal costs shown in Appendices A-I to A-III are noticeably higher than the normal cost for the more typical member, as given in Appendix A-IV. The higher normal costs result from the assumption that those judges retire as soon as they qualify for a pension, which means that they contribute for as short a period as possible and collect their pensions as long as possible. In reality, relatively few judges retire as soon as possible.

B. Analysis of DM-3 Pensions

The analysis of DM-3 pensions is complicated by the fact that some, but not all, DM-3s receive a Special Retiring Allowance (SRA), which is an extra 2% pension for each year of service (to a maximum of ten years) in an eligible deputy minister position. Participants are not required to make contributions toward the cost of the SRA.

A DM-3 who is not eligible for an SRA would accrue a standard 2% annual PSSA¹ pension entitlement with a CPP offset reduction at age 65. The PSSA employee contribution rate was assumed to be frozen at the current² rate (i.e. 4.0% on salary up to the YMPE and 7.5% for all salary in excess thereof). For calendar year 2000, the average DM-3 contribution rate to the PSSA works out to 6.77% of total salary, where the assumed salary is \$179,100 and the YMPE is \$37,600.

DM-3s were assumed to be subject to the same demographic assumptions as judges because they would have much more in common with judges than with other PSSA members.

Appendices B-I to B-III show the results for DM-3 primary pensions only whereas Appendices C-I to C-III show the results for the total pension package, which includes any survivor pension that might eventually become payable. In these Appendices, it was taken that all those participating in the SRA would do so for the maximum possible ten years. In practice, the actual SRA participation period often falls short of the maximum.

C. Projection of Judicial Population

In my letter of 10 December 1999 to Mr. Peacock, I made projections for the next 50 years as to the proportion of the judicial population that would be eligible for retirement under the Rule of 80. Although not stated in that letter, I can confirm that such projections were made in accordance with the demographic assumptions of the most recent (i.e. March 1998) statutory actuarial report on the judicial pension plan.

It was assumed that sufficient new male judges would be appointed so that the male population would remain at 817 (i.e. the figure for March 1997) indefinitely. However, the female population was assumed to rise by 15% per annum initially with smaller increases thereafter until an ultimate annual increase of 2% per annum was first attained in the year 2014.

The assumed age distribution of the new appointees by sex was identical to the actual age distribution of the appointees by sex during the period April 1994 to March 1997, being as follows:

¹ In reality, part of the entitlement would come from an RCA; however, this distinction is of no relevance to an employee and has therefore been ignored herein.

² The PSSA specifies that the current rate will hold until 31 December 2003 and that it can be raised gradually thereafter.

Age Last Birthday at Appointment	Males (%)	Females (%)
35-39	1	7
40-44	9	38
45-49	34	42
50-54	34	9
55-59	16	4
60-64	6	0
Total	100	100

Average: 50.8 years 45.1 years

Based on the foregoing assumptions for the number and age of new entrants, the projected judicial population is as follows:

Year	Male Population	Female Population	Proportion Female (%)
1997	817	172	17
2003	817	330	29
2008	817	439	35
2013	817	492	38
2018	817	543	40
2023	817	599	42
2028	817	662	45
2033	817	730	47
2038	817	806	50
2043	817	890	53
2048	817	983	55

The actual female proportion as at 1 March 2000 was 23% (231 of 1,016 total), which fits in nicely with the foregoing chart. However, I note that the corresponding population of 1,016 is only marginally higher than the 989 as at 31 March 1997. The projected population of 1,147 for 31 March 2003 will not be realised if this trend continues.

The average age last birthday of the foregoing projected populations is as follows:

Year	Males	Females	Total
1997	60.6	50.0	58.7
2003	60.2	50.9	57.5
2008	59.8	53.0	57.4
2013	60.3	55.5	58.5
2018	60.7	56.7	59.1
2023	60.5	56.7	58.9
2028	60.4	55.9	58.4
2033	60.4	55.5	58.1
2038	60.5	55.7	58.1
2043	60.6	56.1	58.2
2048	60.6	56.2	58.2

The average age last of the males does not vary much from its ultimate figure of 60.6 years whereas that of the females increases strongly until the ultimate figure of 56.2 years is almost reached in 2013. The overall average age of the judiciary does not exhibit much annual variation from the ultimate figure of 58.2 years.

It should be noted that the average age at appointment during the three-year period ending March 2000 has increased by about two years for males and about three years for females relative to the statutory valuation assumption upon which the foregoing projections are based. If the analysis in my letter of 10 December 1999 were redone using these increased ages at appointment, the proportion of the judicial population eligible for a full pension would be somewhat lowered for the year 2018 and thereafter; as well, the average age would be somewhat higher in each future year.

D. Remaining Life Expectancies for Judges

Appendix D shows the remaining life expectancies for judges who retire at various ages. One set of expectancies is for retirements in future years' ranging from 2015 to 2022 while the other set assumes retirement in the year 2000. There is a noticeable difference between the two sets of figures because the statutory mortality assumption, upon which both are based, anticipates annual decreases in the general level of mortality.

I trust that the Commission will not hesitate to let you know if any further analysis is required.

Yours truly,

L.M. Cornelis

cc: J.-C. Ménard (OCA)
B. Peacock (TBS)

Our File: P6120-5

18 April 2000

Mr. D. Sgayias, Q.C.
Senior General Counsel, Civil Litigation Section
Department of Justice
Room 2371
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear David:

Subject: Benefit/Contribution Ratio in Defined Benefit Pension Plans

When a member of a defined benefit pension plan retires, the present value of the pension entitlement can be calculated on a given actuarial basis (i.e. demographic and economic assumptions). The present value can then be expressed as a multiple of the member's own accumulated required contributions to the plan. It is clear that the provisions of the plan will affect such ratio – for example, it will be infinite if the plan is non-contributory for the members. However, the ratio can also differ greatly for members of the same plan. The purpose of this letter is to discuss the reasons therefor.

For simplicity, the discussion shall be confined to a plan where the benefit formula is of the form

Years of Pensionable Service	X	Unit Credit	X	Final Average Salary
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For example, under the PSSA one might retire with 30 years of pensionable service and a \$50,000 average salary. With the 2% unit credit, the initial pension would be \$30,000 per annum.

The key to the foregoing formula is that the amount of pension (and also the present value of the pension entitlement) is tied directly to length of service and final average salary, but in no way to the member's own accumulated contributions. That being the case, there can be a wide disparity of benefit/contribution ratios for members of the same pension plan.

Returning to the PSSA example of someone retiring in a given calendar year with a \$30,000 annual pension, the present value of the pension entitlement would be maximised by factors such as:

- retirement being at the earliest possible age so that one is a pensioner for as long as possible;
- being a female rather than a male (assuming that one is unmarried), since females have longer life expectancies on average;
- having a younger spouse so that the survivor pension would be payable longer on average; and
- being in normal health rather than being disabled.

Conversely the member's own accumulated contributions would be minimised if the salary were relatively low until the last five years (PSSA benefit is based on best five-year salary history). This would be the case if the member received a promotion late in his or her career.

It is clear that many factors can significantly affect the benefit/contribution ratio for an individual member, and so it is not surprising that significant variations can occur within the same plan.

I trust that you will contact me if there are any questions.

Yours truly,

L.M. Cornelis

cc: J.-C. Ménard (OCA)
B. Peacock (TBS)

March 27, 2000

DELIVERED

Mr. David Sgayias
Department of Justice, Canada
East Memorial Building
284 Wellington Street
Room 2171
Ottawa, ON K1A 0H8

Dear Mr. Sgayias:

**Re: Bill C-23, *An Act to modernize the Statutes of Canada in relation to
benefits and obligations: Proposed Amendments to the Judges Act*
(Canada)**

Enclosed please find the Commission's letter of even date herewith to the Honourable Anne McLellan, Minister of Justice and Attorney General of Canada, concerning Bill C-23.

A copy of this correspondence is being sent to all who have made written submissions to the Commission.

Yours very truly,

(Ms) Deborah Lapierre
Executive Director

March 27, 2000

DELIVERED

The Honourable Anne McLellan
Minister of Justice and
Attorney General of Canada
c/o Department of Justice, Canada
East Memorial Building
284 Wellington Street
Room 2171
Ottawa, ON K1A 0H8

Dear Ms McLellan:

Re: Bill C-23, *An Act to modernize the Statutes of Canada in relation to benefits and obligations* ("Bill C-23"): Proposed Amendments to the *Judges Act (Canada)*

By letter dated February 10, 2000, Mr. David Sgayias, Counsel for the Government of Canada (the "Government") on the quadrennial review of the Commission now in progress concerning judicial compensation and benefits (the "Quadrennial Review"), informed the Commission of the intended tabling by the Government of Bill C-23 for the purposes of effecting amendments to various federal statutes, including the *Judges Act* (Canada) (the "*Act*") in relation to survivor annuity benefits. In the same letter, on behalf of the Government Mr. Sgayias requested the Commission's advice and recommendations on Bill C-23 in relation to the amendments proposed therein to the *Act*. This request was repeated on February 14, 2000 during the course of a hearing before the Commission.

As a result of a letter dated March 22, 2000 from Mr. Sgayias, the Commissioners understand that the Standing Committee is likely to report Bill C-23 for third reading in the House of Commons on Wednesday, March 29, 2000. For this reason, the views of the Commission, as earlier requested, were sought at the earliest possible date.

The purpose of this letter, therefore, is to respond to this request from the Government.

In light of the Commission's mandate and authority under the *Act*, and having regard to the issues raised before the Commission by various parties during the course of the current

Quadrennial Review, it is the Commission's view that it is proper and appropriate that its advice and recommendations be provided on those portions of Bill C-23 pertaining to proposed amendments to the *Act*. At the Commission's hearing on February 14, 2000 all parties in attendance agreed that the Commission's response should be provided in this regard.

To assist it in its consideration of Bill C-23, the Commission engaged the services of Professor Patrick Monahan of Osgoode Hall Law School, York University. The advice provided to the Commission by Professor Monahan is set out in a letter from him to the Chair of the Commission dated March 24, 2000, a copy of which is attached.

As appears from Bill C-23, the amendments proposed thereunder to be made to the *Act* concern annuity benefits for survivor partners of judges. Various parties to the Quadrennial Review, including the Government, requested the Commission to consider certain proposals concerning the suggested extension of survivor annuity benefits to unmarried conjugal partners of judges, together with related matters. The Commission understands that Bill C-23 is the Government's suggested legislative response to various of these proposals, among other matters.

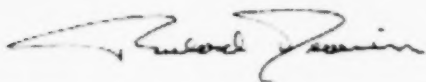
When the Commission learned of the introduction of Bill C-23, it was concerned to ascertain the position of the parties to the Quadrennial Review concerning the sufficiency and appropriateness of the provisions of Bill C-23 in relation to the *Act*, and having regard to the proposals made before the Commission concerning survivor annuity benefits. Accordingly, at its hearing on February 14, 2000, the Commission invited the comments of interested persons concerning the relevant provisions of Bill C-23. The Commission was informed that the amendments to the *Act* proposed in Bill C-23 were considered by the parties as timely and in accordance with the submissions made by relevant parties for changes to the survivor annuity provisions of the *Act*. In particular, all parties who appeared before the Commission and who commented on the proposed changes in Bill C-23 to extend survivor annuity benefits to common law and same-sex survivors, expressed their support for these changes. They also argued that passage of those portions of Bill C-23 intended to effect such an extension should not be delayed.

The Commission has considered the relevant provisions of Bill C-23, the submissions of the parties concerning survivor annuity benefits, the advice provided to the Commission by Professor Monahan, the positions of the parties concerning Bill C-23, and the recent relevant jurisprudence of the Supreme Court of Canada, and offers the following observations and recommendations:

- (i) the proposed amendments to the *Act* set out in Bill C-23 are important and timely to ensure that the provisions of the *Act* comply with the requirements of the Canadian *Charter of Rights and Freedoms* and with recent decisions of the Supreme Court of Canada concerning benefits and obligations in relation to same-sex and common-law relationship couples. In the Commission's view, passage should not be delayed of those portions of Bill C-23 intended to effect such amendments to the *Act*;

- (ii) the proposed amendments to the *Act* set out in Bill C-23 represent an appropriate response to those issues concerning survivor annuity benefits as raised before the Commission and pertaining to the availability of benefits to unmarried partners of the same or opposite sex; and
- (iii) the inclusion in Bill C-23 of apportionment rules, to apply in cases where there are competing claims concerning survivor annuities, is appropriate and, as set out in Bill C-23, provides a satisfactory basis for resolving any conflicts that might arise in circumstances where there is more than one survivor.

Our observations and recommendations in this regard are hereby respectfully submitted.

A handwritten signature in dark ink, appearing to read "Richard Drouin", with a stylized flourish at the end.

(Mr.) Richard Drouin
Chair
Judicial Compensation & Benefits Commission

FOR THE COMMISSION

March 24, 2000

Privileged and Confidential

Mr. Richard Drouin, O.C., Q.C.
Chair
Judicial Compensation and Benefits Commission
8th Floor
99 Metcalf Street
Ottawa, ON K1A 1E3

Dear Mr. Drouin,

Re: Proposed Amendments to Judges Act:
Bill C-23

You have asked for my advice concerning the proposed amendments to the *Judges Act*¹ set out in Bill C-23, *An Act to modernize the Statutes of Canada in relation to benefits and obligations*,² in light of the recent decisions of the Supreme Court of Canada in *Miron v. Trudel*,³ *Egan v. Canada*⁴ and *M. v. H.*⁵ and the submissions to the Commission by various parties concerning survivor annuities.

Bill C-23

Bill C-23 is an omnibus bill that amends 68 federal statutes so as to extend benefits and obligations to same-sex couples on the same basis as common-law opposite-sex couples. The bill is designed to bring federal legislation into compliance with recent decisions of the Supreme Court of Canada holding that governments cannot limit benefits or obligations to

¹R.S.C. 1985, c. J-1, as amended.

²Bill C-23, Second Session, 36th Parliament, (First reading February 11, 2000) (hereinafter "Bill C-23").

³[1995] 2 S.C.R. 418 ("Miron").

⁴[1995] 2 S.C.R. 513 ("Egan").

⁵[1999] 2 S.C.R. 3 ("M. v. H.").

opposite-sex common-law relationships.⁶

Under the current *Judges Act*, annuities and certain other payments are provided for the surviving spouse of a judge. However, these payments are only provided to married spouses, and do not extend to unmarried partners of the same or opposite sex. The proposed amendments in Bill C-23 would add a new definition of 'survivor' to section 2 of the *Judges Act*, which would include both a person who was legally married to the judge immediately before his or her death and a person who has cohabited with the judge in a conjugal relationship for a period of at least one year immediately before his or her death. Bill C-23 further provides that 'survivors' are entitled to payment of an annuity under section 44(1), a removal allowance under section 40(1), and a lump-sum payment under section 46.1. Bill C-23 also provides a method of apportioning an annuity in circumstances where there are two survivors with an entitlement to the annuity. There are further provisions ensuring that any children of survivors are treated on an equal basis in terms of their rights and entitlements under the *Act*.

In this opinion I propose to deal only with constitutional issues in relation to the *Judges Act* arising from the recent Supreme Court decisions in *Miron*, *Egan* and *M. v. H.* Except as expressly set out herein, I do not consider other potential constitutional issues that might be raised in relation to the *Judges Act*.

Recent Section 15 Jurisprudence

The Supreme Court of Canada has developed a complicated test for determining the circumstances in which legislative provisions will be found to be 'discriminatory' within the meaning of section 15(1) of the *Charter*. However, for purposes of the present opinion, it is unnecessary to review the details of this test. I will simply assume that the existing provisions in the *Judges Act* which restrict the entitlement to certain payments to married spouses are discriminatory within the meaning of section 15(1) of the *Charter*, both on grounds of marital status (in that they exclude common law partners) and sexual orientation (in that they exclude same-sex partners). Proceeding on the basis of this assumption, the issue which you have raised for my consideration can be resolved through an analysis of the proposed amendments in Bill C-23 in light of the reasoning and result in the key recent decisions of the Supreme Court dealing with discrimination on the basis of marital status and sexual orientation.

I turn now to a brief summary of the reasoning in these recent cases.

In *Miron* (supra) there were three separate opinions written, with no single opinion attracting the support of a majority of the Court. Madam Justice McLachlin, in an opinion concurred in by Sopinka, Cory and Iacobucci JJ., found that "marital status" was an analogous ground of discrimination for purposes of section 15(1). (The Supreme Court had

⁶See Government of Canada, "Government of Canada to amend legislation to modernize benefits and obligations" (News Release), February 11, 2000.

earlier determined in *Andrews v. Law Society of British Columbia*⁷ that in order to constitute "discrimination" for purposes of section 15(1), there must be a denial of "equal protection" or "equal benefit" of the law on one of the grounds enumerated in s.15(1) or on an analogous ground.) McLachlin J. went on to conclude that the exclusion of unmarried partners from accident benefits available to married partners under a standard automobile insurance policy⁸ violated section 15(1) and could not be justified under section 1. As an appropriate remedy, a revised definition of "spouse" which had later been adopted by the Legislature (and which included heterosexual couples who had cohabited for three years or who had lived in a permanent relationship with a child) was retroactively 'read in' to the impugned legislation.⁹

I note that only four of the nine members of the Court in *Miron* endorsed Madam Justice McLachlin's conclusion that "marital status" is an analogous ground of discrimination for purposes of section 15(1). However, as noted above, I will assume, for purposes of this opinion, that marital status constitutes an analogous ground of discrimination for purposes of section 15(1). I will further assume that the existing provisions in the *Judges Act*, which restrict the entitlement to an annuity or certain other payments to married spouses and which exclude common law spouses is discriminatory within the meaning of section 15(1).

In *Egan* (supra), a majority of the Supreme Court (consisting of L'Heureux-Dubé, Sopinka, Cory, McLachlin and Iacobucci JJ.) agreed that legislation which provided a benefit to a "spouse", defined *inter alia* as a person of the opposite sex (and excluding same-sex couples) violated section 15(1). Although a majority of the Court found the impugned legislation to be contrary to section 15(1), the legislation was ultimately upheld under section 1 since Sopinka J. concluded that the limitation on section 15(1) rights could be demonstrably justified in a free and democratic society.

More recently, in *M. v. H.* a majority of the Supreme Court held that provincial legislation which defined "spouse" as including a "man and a woman who are not married to each other and have cohabited...continuously for a period of not less than three years"¹⁰ violated section 15(1) and could not be justified under section 1. The Court held that excluding same-sex couples from this legislative definition was based on the view that same-sex relationships generally were less worthy of recognition and protection, with this exclusion perpetuating the disadvantages suffered by individuals in same-sex relationships. The majority of the Court was

⁷[1989] 1 S.C.R. 143.

⁸The policy was prescribed by the *Insurance Act* and, on this basis, the exclusion was subject to review under the *Charter*.

⁹Although Madam Justice L'Heureux-Dubé wrote separate reasons, she concurred in the result proposed by McLachlin J., resulting in a majority of five judges for this remedy.

¹⁰See section 29 of the *Family Law Act*, R.S.O. 1990, c. F-3.

of the view that the relevant legislative provision should be declared to be of no force and effect, with the effect of the declaration being suspended for a period of six months.

Applying these cases to the provisions in the existing *Judges Act*, I assume that the existing entitlements under the *Act* providing for annuities and certain other payments to married spouses of judges violate section 15(1) of the *Charter*. The relevant issue is whether the amendments proposed in Bill C-23 cure the constitutional difficulty posed by the existing provisions.

Section 159 of Bill C-23 proposes to add the following definitions to section 2 of the *Judges Act*:

“common-law partner”, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year;

“survivor”, in relation to a judge, means a person who was married to the judge at the time of the judge’s death or who establishes that he or she was cohabiting with the judge in a conjugal relationship at the time of the judge’s death and had so cohabited for a period of at least one year;

These definitions become the basis for determining the entitlements of “survivors” and “common-law partners” to annuities or various other payments under the *Judges Act*.

Discrimination on the basis of ‘sexual orientation’

It is apparent that these definitions place same-sex and heterosexual common law partners on an equal footing. That is, the proposed definitions make no distinction between same-sex and heterosexual common law partners, treating both as being eligible for inclusion within the definition of “common-law partner” and “survivor”.

Therefore, in my view there is no basis for concluding that the proposed definitions constitute discrimination in relation to same-sex common law partners, as distinct from heterosexual common law partners.

Discrimination on the basis of ‘marital status’

However, the definitions do continue to provide somewhat different treatment for married persons as opposed to partners cohabiting in a conjugal relationship outside of marriage. Two continuing distinctions are relevant. First, a common law partner must have cohabited for a period of at least one year in order to fall within the definition of common law partner or survivor. Second, the common law partner must have been cohabiting in a conjugal relationship

at the time the right to an annuity or other payment arises (which in most cases will be upon the death of the judge.) In contrast, a married spouse need not be actually cohabiting with the judge at the relevant time in order to qualify for an annuity or other payment. Therefore the question that arises is whether these continuing distinctions between married and unmarried common law partners constitute discrimination against common law partners.

Considering first the requirement that common law partners must cohabit for a period of at least one year before falling within the relevant definitions, it is apparent that it is an inevitable feature of any such definitions that some determinate period of cohabitation be selected as the basis for inclusion or exclusion. Thus various provincial and federal statutes which include definitions of common-law partners or spouses generally require cohabitation for periods ranging from one year to three years, or define the relationship in terms of being parents of a child. The Supreme Court of Canada, in its recent consideration of such requirements, has commented favourably on legislative provisions which include criteria of this kind, without commenting specifically on the particular criteria or length of time set out in the relevant statutes.

For example, in *Miron*, Madam Justice McLachlin, after finding the existing definition of spouse in the *Insurance Act* to be of no force and effect, 'read in' to the *Insurance Act* a definition of "spouse" which included, *inter alia*, persons who "have cohabited continuously for a period of not less than three years, or have cohabited in a relationship of some permanence if they are the natural or adoptive parents of a child."¹¹ Earlier in her reasons in *Miron*, Madam Justice McLachlin had commented favourably on a definition of "spouse" found in the Ontario *Human Rights Code*, which required marriage or cohabitation for at least one year or having a child together.¹² Madam Justice McLachlin made no comment as to significance of the fact that a three-year cohabitation period was required under the revised version of the *Insurance Act*, as opposed to the one-year period under the *Human Rights Code*.

In *Egan*, at issue was a definition of "spouse" in the *Old Age Security Act*¹³ which provided as follows:

"spouse", in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife.

¹¹See section 224(1) of the *Insurance Act*, R.S.O. 1990, c. 1-8, as read in to the statute in *Miron* by McLachlin J. at paragraph 180.

¹²See *Miron* at paragraph 170 (suggesting that the definition in s.9 of the *Human Rights Code* was an alternative formulation of the definition of "spouse" that would have been less invasive of *Charter* rights.)

¹³R.S.C. 1985, c. O-9, s.2.

As noted above, the majority of the Supreme Court upheld the validity of this provision. However, the dissenting judgment of Cory and Iacobucci JJ., which concluded that the provision was invalid and of no force and effect, would have remedied this constitutional violation by making a declaration in the following terms:¹⁴

"...declar[e] that for the purpose of section 2 of the *Act* the definition of "spouse" should be read down by deleting the words "of the opposite sex" and reading in the words "or as an analogous relationship" after the words "if the two persons publicly represent themselves as husband and wife."

As in *Miron*, the fact that the amended definition of "spouse" would have required a one- year cohabitation period attracted no comment from these members of the Court.

Other recent court decisions have also upheld as valid similar definitions of 'spouse' providing for a one-year cohabitation period.¹⁵

I conclude that, although these decisions have not commented specifically on the requirement of a one-year cohabitation period in the context of the definition of common law relationships, the courts have upheld as valid legislative provisions that have included such a requirement. I also note that the courts have been prepared to uphold requirements of cohabitation for as long as three years in order to fall within the definition of a common law spouse; thus the less onerous one-year requirement set out in Bill C-23 should pose no constitutional difficulty. I conclude that the inclusion of a one-year cohabitation requirement in the definitions of "common-law partner" and "survivor" does not raise any constitutional difficulty.

This leaves for consideration the other distinction that is drawn between common-law partners and married spouses in the proposed definitions, namely, the requirement that the common law partner must have been cohabiting in a conjugal relationship at the time the right to an annuity or other payment arises. In contrast, there is no such requirement in respect of a married spouse who, although legally married, may be living separate and apart from his or her spouse and yet fall within the definition of a survivor.

I note that many statutes, both federal and provincial, continue to draw some distinctions between spouses who are legally married as opposed to those living in common law

¹⁴*Egan* at paragraph 218.

¹⁵See, for example, *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577 (Ont. C.A.) ("reading in" to an existing definition of "spouse" the words "and same sex", and then upholding the amended definition, which provided for a one-year cohabitation period or a requirement that the partners be the parents of a child.)

relationships.¹⁶ Moreover, I note that in a number of recent cases the courts have indicated that legislative definitions of 'spouse' which included a requirement that the partners be cohabiting at the time an entitlement or obligation arises (as opposed to at some point in the past) have been upheld as valid. For example, the provision considered by the Supreme Court in *Egan* defined a "spouse" as including a person "who is living with [another] person" (my emphasis). The provision in the *Income Tax Act* considered by the Ontario Court of Appeal in *Rosenberg* contained a similar requirement.¹⁷ While in neither instance did the courts comment specifically on the requirement of current cohabitation in order to fall within the relevant definition, they were prepared to uphold provisions including such a requirement.

Accordingly, I conclude that the requirement that a person be cohabiting at the relevant time in order to fall within the definition of "common-law partner" or "survivor" in the proposed amendments to Bill C-23 is fully consistent with the recent judicial consideration of similar legislative provisions.

In my view, therefore, the proposed amendments represent an appropriate response to the recent Supreme Court of Canada decisions relevant to these amendments.

Federalism Arguments

The remaining issue is whether the proposed amendments raise any constitutional concerns in terms of the division of legislative powers between Parliament and the provinces. I note that in 1998 the government introduced amendments to the *Judges Act* which would have introduced a definition of "surviving spouse" into section 2 of the *Act*.¹⁸ This definition included a person of the opposite sex who had cohabited with a judge in a conjugal relationship for a period of at least one year immediately prior to the judge's death. Surviving spouses would have been entitled to an annuity and certain other payments under the *Act*.

When these amendments reached the Senate, an expert witness raised questions as to whether these amendments represented an intrusion into provincial jurisdiction over "property

¹⁶See, for example, the provisions in the Ontario *Family Law Act*, which were considered in *M. v. H.* Although this legislation provides support obligations upon marriage breakdown as between common law spouses, it does not extend rights in relation to division of property.

¹⁷See section 252(4), which provides that "words referring to a spouse at any time of a taxpayer include the person...who cohabits at that time with the taxpayer in a conjugal relationship..." (my emphasis).

¹⁸See *An act to amend the Judges Act and to make consequential amendments to other Acts*, 36th Parliament, First Session, Bill C-37.

and civil rights" under section 92(13) of the *Constitution Act, 1867*.¹⁹ It was suggested that the attempt to legislate the division of family assets such as an annuity through the definition of "surviving spouse" may amount to legislation in relation to "property and civil rights" rather than in relation to the pension entitlements of judges. It was also pointed out that certain provincial statutes provided for a cohabitation requirement in respect of common law spouses that differed from the period set out in the proposed federal legislation. Ultimately the proposed definition of "surviving spouse" was deleted from the bill.

In my view, any suggestion that Parliament lacks jurisdiction to provide for the entitlements of "common-law spouses" or "survivors" in the manner proposed in Bill C-23 is unfounded. Section 100 of the *Constitution Act, 1867* provides express legislative authority for Parliament to provide for the "Salaries, Allowances, and Pensions" of the federal judiciary. In *Beauregard v. Canada*,²⁰ the Supreme Court of Canada had occasion to consider the scope of this provision, in the context of an amendment to the *Judges Act* which required the federal judiciary to make a contribution towards the cost of their annuity or pension entitlements under the *Act*. One of the arguments that was raised against the validity of the requirement for a contribution was that this represented an intrusion into exclusion provincial jurisdiction over the "administration of justice in the province".

The Supreme Court of Canada unanimously rejected this federalism argument and upheld the impugned provision.²¹ Chief Justice Dickson, whose opinion on this point was endorsed by all members of the Court, held that section 100 represents a "subtraction" from provincial jurisdiction over the administration of justice. Dickson C.J. described the nature of this subtraction as follows:²²

It [section 100] states that the salaries and pensions of superior court judges shall be fixed and provided by the Parliament of Canada. It is difficult to conceive of clearer words. *To attempt to create a provincial role in the determination of the salaries and pensions of superior court judges is blithely to ignore this clear mandate.* Indeed it turns s. 100 on its head...Both the intent and the actual wording of s. 100 are clear. *There is no 'federalism' limitation on Parliament's capacity to change the basis of pensions for superior court judges from non-contributory to*

¹⁹See the testimony of Professor B. Jamie Cameron, at the Senate Committee on Legal and Constitutional Affairs, October 6, 1998 (*Proceedings of the Senate Committee on Legal and Constitutional Affairs*, Issue 34, October 6, 1998).

²⁰[1986] 2 S.C.R. 56.

²¹I note that although the Court was divided 3-2 on an issue relating to the application of the *Canadian Bill of Rights*, the Court was unanimous on the federalism issue.

²²[1986] 2 S.C.R. 56 at p. 80-81.

contributory. (my emphasis)

Later, Dickson C.J. commented that s.100 does not impose on Parliament the duty to continue to provide judicial pensions on precisely the same basis as was the case in 1867 and that s. 100 "can today support federal legislation based on a different understanding of 'pensions'".²³ He also noted that s. 100 supports federal jurisdiction to provide for a "scheme" in relation to judicial pensions.²⁴

...the word 'pensions' in s. 100 specifically authorizes Parliament to deal with this subject-matter. In exercising that jurisdiction Parliament must legislate with respect to both the quantum and the scheme of judicial pensions. The 1975 law dealt with the scheme. Since the scheme chosen was a widely used and accepted one and since it was introduced in conjunction with other changes to judicial benefits in 1975, I see no objection to it on the ground contended for by the respondent.

I note that it is a standard requirement of pension schemes to provide for entitlements to surviving spouses or partners. Indeed, the version of the *Judges Act* that was before the Supreme Court in *Beauregard* provided for entitlements to "surviving spouses", defined in terms of legally married spouses. If Parliament can provide for such an entitlement, it necessarily follows that it must also be able to define the class of persons who have a right to claim it and provide a basis for resolving any conflicts that might arise in circumstances where there is more than one claimant. Thus there can be no suggestion that in legislating for survivors' benefits (including enacting apportionment rules designed to allocate rights in instances where there is more than one survivor) or entitlements for common-law spouses Parliament is acting for a colourable purpose. Rather, the proposed amendments set out in Bill C-23 are clearly and properly part of the "scheme" for judicial pensions.

In short, based on the reasoning of the Supreme Court in *Beauregard*, it is my opinion that there is no federalism objection that could successfully be raised against the amendments in Bill C-23. The definition of the class of person entitled to receive an annuity or other payment under the *Judges Act* as well as the provision of apportionment rules in cases where there are competing claims fall within the exclusive jurisdiction of Parliament, as necessarily incidental to federal jurisdiction to provide a judicial pension scheme. This jurisdiction represents a "subtraction" from provincial jurisdiction under section 92. To attempt to provide for a provincial role in relation to the scheme of judicial pensions would, as Dickson C.J. stated in *Beauregard*, turn section 100 of the *Constitution Act, 1867* "on its head".

I trust that the foregoing responds to the questions you have raised in relation to Bill C-23. I would be happy to elaborate on any matters discussed in this opinion at your

²³*Ibid* at p.81.

²⁴*Ibid* at p.84.

convenience.

Yours very truly,

Patrick J. Monahan
Professor of Law

Costing of the Recommendations Pertaining to the Judicial Annuities

As requested, we have estimated the cost of the Commission's recommendations relative to the judiciary's recommendations and the related costings prepared by the Chief Actuary.

There are corridors of professionally acceptable answers for the costings. For purposes of preparing these cost estimates, we have relied upon the estimates prepared by the Chief Actuary. Considering the fact that we do not have access to the detailed membership database, no attempt was made to verify the Chief Actuary's results. Further, we could only make rough estimates by applying rule of thumb adjustments in order to reflect the anticipated differences between the judiciary's and the Commission's recommendations.

In terms of the bases used by the Chief Actuary in his January 20, 2000 letter, those estimates are in line with both bases I and III; our approximation models not being accurate enough to differentiate between these two bases, which tend to produce similar results. In our opinion, the basis II is a less appropriate basis for purposes of the present cost estimates; no attempt was made to adapt our results under its application.

Summary of Results:

	Estimated Increase in Accrued Liabilities	Estimated Increase in Annual Cost*
	(\$ millions)	(\$ millions)
1. Cessation of contributions	-----	2.30 to 2.50
2. Supernumerary status	(2.10 to 3.50)	(0.30 to 0.50)
3. Early retirement	1.00 to 1.40	0.20 to 0.28
4. 60% Survivor Pension	0.00 to 0.60	0.00 to 0.06
5. 75% Survivor Pension	0.00 to 1.00	0.00 to 0.10
6. Article 44 (3)	<u>0.30 to 0.50</u>	<u>0.03 to 0.05</u>
	(0.80 to 0.00)	2.23 to 2.49

Note (*): The estimated annual costs in the second column represent the costs for benefits accruing each year.

Methodology to arrive at the cost estimates

All the cost estimates are based on a \$178,100 annual salary base, to be consistent with the Chief Actuary's calculations.

1. Cessation of contribution

Using the age/service distribution presented in the last actuarial report prepared by the Chief Actuary as at March 31, 1998, we have projected that in the year 2000/2001, there would be 253 judges entitled to a full pension but continuing their active duties, including some 43 judges hired before February 1975. Should their contributions be reduced to 1% of salary, the reduction in the total contributions would amount to about \$2,400,000 in the year 2000/2001.

Restoration of the contribution room

The restoration of the contribution room does not affect the financials of the judicial annuities. If all of the 253 judges referred to above would contribute the maximum allowable contributions to their RRSPs, their taxable income would be reduced collectively by \$3,400,000.

2. Supernumerary status

The Chief Actuary estimated that the availability of the supernumerary status from age 55 with 15 years of service would produce a reduction in accrued liability of \$5.5 MM and a reduction in annual normal costs of \$800,000. The Commission's recommendation is defined in terms of eligibility to a full pension, therefore with 15 years of service and a sum of age and service equal to 80. In both cases it replaces the age 65 rule to opt for the supernumerary status. We have estimated the impact of the proposal at approximately 50% of the impact estimated by the Chief Actuary.

The Chief Actuary noted that the cost reduction would be offset by an increase in payroll. In our model, about 83 additional judges would be entitled to the status. Should a high proportion, say 75%, elect the status, 31 additional judges would be required if each election resulted in a 50% reduction in workload:

31 judges at \$178,100 represents an expense of \$5,500,000 per annum.

3. Early retirement

The early retirement privilege may end up being used by about 5% of the judges. The Chief Actuary has calculated that the normal cost of the early retirement program proposed by the council/conference was \$400,000 per annum. The early retirement program recommended is more restrictive:

- The penalty is 5% per annum instead of 3%.
- The prorating is calculated on the period required to become entitled to a full pension, instead of 15 years.
- The eligibility begins at age 55.
- The pension is indexed to the Consumer Price Index during the deferral period.

Based on approximate models, it is expected that the cost of the recommended program will be in the neighborhood of 60% of the cost of the proposal, therefore \$240,000 per annum.

4. Survivor protection at 60%

The actuary will have the choice between two valid approaches:

- i) Assume that the offer of the 60% survivor protection causes no additional cost, since the pension is adjusted by actuarial equivalence. This is the commonly used approach; it is based on the assumption that choosing between a 50% or a 60% survivor protection leads to no significant anti-selection, or efficient decisions of the retiree with regard to the state of his/her health versus his/her spouse's state of health. Alternatively, the actuary may calculate the actuarially equivalent pension assuming that the retiree asking for an enhanced survivor protection is less healthy than an average person of same sex and gender. Under all these assumptions, the cost is nil.
- ii) Assume that any increase in survivor protection gives room for anti-selection, that is efficient decisions on the relative state of health of the retiree and of the spouse. We agree that if the choice is in terms of a 50% or a 100% survivor protection, it is acceptable and practical to assess the potential cost at \$700,000 per annum, as the Chief Actuary quoted in his January 20th letter. When, the difference between the options is so large, the other considerations leading to the decision become less important, and the potential for anti-selection is more important.

With this line of thought, we have to assign a value to the impact of a small increase (from 50% to 60%) as compared to a substantial increase in the survivor benefits (from 50% to 100%). Technically, the anti-selection would be minimal at first, growing slowly initially, and more rapidly as we depart significantly from the 50% level. In other words, the impact of the anti-selection will grow exponentially, as opposed to linearly.

Under this approach, we estimate the increase in normal costs at about \$40,000 per annum.

5. Survivor protection at 75%

Based on the considerations discussed above, using the approach 4 ii), we estimate the additional normal cost at about \$100,000 per annum for the recommendation. Yet, the actuary could calculate the actuarial equivalence assuming the spouse has an above average state of health, given his/her age and gender, and the availability of the option would be cost free through proper actuarial equivalence.

6. Article 44(3) removed

The actuary will have statistics with regard to the number of survivor pensions that have been denied by the application of the clause. In the absence of statistics, we can only build a simplistic model to advance an estimate.

If 80% of the retirees die with a surviving spouse, of whom 1%* remarry with a judge, of whom 60% will survive the second spouse, the denial of the survivor pension would occur in $\frac{1}{2}$ of 1% of the deaths of retired judges.

The increase in the cost of the total program would be in the neighborhood of $\frac{1}{10}$ of 1%. We assume the clause is changed only with regard to future widows.

* Note: According to Statistics Canada (Marriages 1995, Catalogue no. 84-212-XPB), unmarried males at ages above 65 remarry at the rate of about 1% per annum, whereas only 0.2% of unmarried females do. It means that over the years, about 2% of the widows of male judges will remarry, a fraction thereof with a judge. Should half of such widows remarry with a judge, the 1% assumption would be acceptable.

OSGOODE HALL LAW SCHOOL
York University
MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Mr. Richard Drouin, O.C., Q.C.
Chair, Judicial Compensation and Benefits Commission

FROM: Patrick J. Monahan

RE: *Proposed Group Life Insurance*

DATE: April 28, 2000

1.0 Introduction

- .1 Further to your request, this memorandum will set out my preliminary views on the following issue:

in the context of the proposed life insurance benefits sought by the Canadian Judges Conference and the Canadian Judicial Council in their submission to the Commission, what are the *Charter* s.15 implications, if any, of a "one-time opt out" for current appointees?

- 1.2 As discussed, the purpose of this memorandum is to provide the Commissioners with my preliminary views only, with a view to determining whether further research and analysis of this matter is warranted.

2.0 Section 15 Test

- 2.1 As set out in my letter to you dated April 18, 2000 dealing with the criteria for retirement benefits in subsection 42(1)(a) of the *Judges Act*, the Supreme Court of Canada has articulated a three-step test for assessing equality rights claims under section 15 of the *Charter of Rights*. This test focuses on the following:
- a. does a law impose differential treatment between the claimant and others, in purpose or effect?;
 - b. are one or more enumerated or analogous grounds of discrimination (i.e. those expressly identified in section 15, or grounds analogous to those identified) the basis for the differential treatment?; and

- c. does the law have a purpose or effect that is discriminatory within the meaning of the equality guarantee?

(See generally, *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (hereinafter *Law*) at paragraph 88.) The analysis which follows should be read in conjunction with my discussion of the *Law* test as set out in my April 18, 2000 letter, which discussion will not be repeated here.

3.0 Existing Life Insurance Options

- 3.1 Judges currently have the right to subscribe for life insurance at their own expense under the Public Service Management Insurance Plan (PSMIP). The 'Basic Life' benefit under this plan is a payment equal to 100 per cent of annual salary until they reach age 60. Insurance then reduces by 10 per cent of the original amount per year beginning at age 61. By age 69 the benefit has reduced to 10 per cent and remains at that level until retirement, when it reduces to zero. There is no medical requirement for the Basic Life benefit.
- 3.2 Judges also have the option of subscribing for Supplementary Life insurance under the PSMIP, with a benefit equal to 100 per cent of their annual salary, once again at their own expense and with the same reductions beginning at age 61. Supplementary Life is subject to satisfactory evidence of insurability.
- 3.3 Basic Life and Supplementary Life insurance are included in what is described as the "Main Plan" under the PSMIP. The purchase of insurance under the Main Plan is optional for those eligible to participate. Premiums vary by the age and gender of the subscriber. (See attached Schedule 1, setting out a summary of the premiums for different classes under the PSMIP.) Since insurance under the Main Plan is employee-paid, it does not give rise to a taxable benefit under the *Income Tax Act* ("ITA").
- 3.4 The Main Plan under the PSMIP also provides subscribers with the possibility of purchasing life insurance for dependants, as well as accidental death and dismemberment insurance (AD & D) and long-term disability insurance (LTD). It is not clear to me, based on the evidence tendered to the Commission, whether Judges currently have a right to subscribe for these additional benefits.
- 3.5 There is also an "Executive Plan" under the PSMIP. The Executive Plan is employer-paid group insurance provided to Order in Council Appointees, with a benefit equal to 200 per cent of annual salary. Since this insurance is employer-paid, it gives rise to a taxable benefit under subsection 6(4) of the *ITA*. Under *ITA* Regulation 2700, the taxable benefit is a flat per capita amount per \$1,000 of life insurance for each member of the group insurance plan, calculated with reference to the premiums paid for the insurance. Participants in the Executive Plan also have the right to apply for supplementary life

insurance under the Main Plan (i.e. an additional 1 times salary) at their own expense.

- 3.6 Premiums for basic life insurance under the Executive Plan do not vary by age or gender. Instead, as is set out in Schedule A hereto,¹ a flat monthly premium of \$0.25 per \$1,000 of insurance applies. I am advised by the actuarial experts with whom I have discussed this issue that flat premiums of this type are common in employer-paid group insurance plans.
- 3.7 The result is that in group life insurance there is necessarily some cross-subsidization of older participants by younger participants, and of males by females. This is because the mortality rate and therefore the risk represented by younger persons and women, respectively, is lower than that for older persons and for men. Despite these different risks, employer-paid life insurance results in the identical taxable benefit for all members without regard to age or gender, which creates the cross-subsidization described above.
- 3.8 The employer-paid group life insurance under the Executive Plan is optional. It is my understanding (based on informal discussions with the actuarial experts) that those opting out may reverse that decision and opt-in after five years, with evidence of insurability at that time.
- 3.9 In addition to these benefits under the PSMIP, it is my understanding that there is group life insurance also provided to all public servants under Part II of the *Public Service Superannuation Act* (the "PSSA"). Part II of the PSSA provides for a Supplementary Death Benefit ("SDB") equal to 200 per cent of the participant's annual salary.
- 3.10 The SDB is group life insurance. Participants are required to contribute to the Consolidated Revenue Fund at the rate of \$0.05 per month for every \$250 of the participants' benefit. There is no variation in contributions in terms of age or gender, which gives rise to the cross-subsidization of older participants and males by younger participants and females, as described in paragraph 3.7 above.
- 3.11 Unlike the PSMIP (where participation is optional), participation in the group life insurance plan under the PSSA is mandatory for virtually all those employed in the federal Public Service (those employed in or under any department or portion of the executive government of Canada) with very limited exceptions. (See sections 47(1) and 53 of the PSSA.)

4.0 Proposed Judges' Life Insurance

- 4.1 The Joint Submission of the Canadian Judges Conference and the Canadian Judicial Council proposed that judges be included in the employer-paid Executive Plan under the

¹See "Public Service Management Insurance Plan (PSMIP) Monthly Premium Rates at January 1, 2000".

PSMIP. However, the Government of Canada (the "Government") objected to this proposal on the basis that including judges within the Executive Plan would increase the premiums paid (and thus the taxable benefit) for each participant in the Plan. (See *Submission of the Government of Canada to the Judicial Compensation and Benefits Commission* (December 20, 1999) at paragraph 54.)

- 4.2 The Government submission raised the possibility of establishing a separate "stand alone" judicial life insurance plan within the PSMIP, for which the Government would assume the costs. The difficulty with this proposal, according to the Government, was that it could be open to the criticism that younger female judges who participate in the plan would be subsidizing older male participants. According to the Government submission, the taxable benefit to younger female judges could leave them worse off than if they were to purchase insurance coverage from their own funds. (See *ibid*, paragraph 57, and Appendix 19.) The Government suggested that there may be other plan designs that would provide improved coverage in an equitable fashion. These alternative plan designs were not identified.
- 4.3 In an attempt to address these concerns, the Conference and Council proposed to create a separate pool within the existing Executive Plan in the PSMIP, to be composed solely of judges. This would have the effect of eliminating any possible cross-subsidization between judges and existing members of the Plan. It was also proposed to grant existing judges a one-time opportunity to opt out of the plan upon its introduction. (See the *Reply Submissions of the Canadian Judges Conference/Canadian Judicial Council*, January 21, 2000 at p. 13-14.) However, judges appointed after the introduction of the plan would be required to participate, thereby giving rise to the cross-subsidization of older males by younger females, as described above.

5.0 Life Insurance Section 15 Issues

- 5.1 It is first necessary to identify the nature of the potential section 15 issue that might arise from the proposal in paragraph 4.3. There are two distinct ways in which this proposal might be thought to create an 'inequality' and thus a potential claim of discrimination under section 15:
- a. the fact that only existing judges are granted a right to opt out, and that such a right would not be granted to judges appointed after the introduction of the plan, might be thought to constitute discrimination against future appointees as compared with current appointees;
 - b. the fact that younger female participants would be cross-subsidizing older male participants in the manner described earlier, and that participation in the plan would be compulsory for all future appointees, might be thought to constitute discrimination against these younger female appointees as compared to older male appointees.

- 5.2 In my view, the differential treatment described under paragraph 5.1(a) is not the kind of differential treatment that can give rise to a successful section 15 claim, for two reasons.
- 5.3 First, the Supreme Court of Canada has made it clear that only discrimination on an enumerated or analogous ground can give rise to a claim under section 15. The differential treatment described in paragraph 5.1(a) is between judges appointed prior to a certain date and those appointed thereafter. The class of judges that is subject to less favourable treatment (those appointed after the date of introduction of the life insurance plan) will include men and women of varying ages. Thus it seems difficult to see how they could be described as a group or class of person that is identified by one of the enumerated or analogous grounds in section 15. Further, since the differential treatment is not being imposed on the basis of an enumerated or analogous ground, it cannot give rise to a claim of discrimination under section 15.
- 5.4 A second relevant consideration in relation to this first section 15 argument is that it is common in both the private and public sectors when changing terms and conditions of an office or employment to permit existing office holders or appointees to opt out of the changes. This is because an employer has no right to unilaterally change the terms and conditions of appointment or employment.
- 5.4.1 One illustration of this approach is the manner in which the requirement that judges contribute towards the cost of their annuities was introduced in 1975. Judges appointed prior to the introduction of the legislation implementing this change were not required to contribute to the same extent as those appointed afterwards.
- 5.4.2 This differential treatment was challenged by a judge who had been appointed after the legislation implementing it had been introduced but before it became law. One of the grounds for the challenge was that it was contrary to the guarantee of "equality before the law" in the *Canadian Bill of Rights* to discriminate in this way against judges appointed after the date the legislation was introduced. This argument was rejected and the requirement for annuity contributions for future appointees upheld in the Supreme Court of Canada in *The Queen v. Beauregard*, [1986] 2 S.C.R. 56.
- 5.4.3 Thus, even if differential treatment between judges appointed before a certain date and those appointed afterwards were found to be differential treatment on the basis of an enumerated or analogous ground, the differential treatment is unlikely to constitute 'discrimination' as that term has been interpreted by the Supreme Court of Canada. (See the discussion at pages 20-22 of my letter of April 18, 2000 on section 42(1)(a) for the judicial interpretation of the term 'discrimination'.)
- 5.5 The concern identified in paragraph 5.1(b) does involve an allegation of differential treatment on enumerated grounds of discrimination (namely sex and age) and thus could potentially give rise to a successful claim under section 15 (assuming that the other elements of the *Law* test were satisfied.)

6.0 Differential Treatment by Age and Sex

- 6.1 There are a number of very difficult hurdles that would have to be overcome for the claim identified in paragraph 5.1(b) to succeed under section 15 and 1 of the *Charter*.
- 6.2 The first difficulty is that the discrimination arises from the provision of a government-funded benefit to a defined class of persons. Those cases in which government benefit programs have been successfully challenged under section 15 of the *Charter* have involved claims brought by persons who were excluded from the benefit in question. (See the cases discussed in my April 18, 2000 letter at pages 6-8.) The claim which is under consideration here is quite different and novel. This claim involves an allegation of discrimination on the basis that the person is being forced to receive a government benefit that they would prefer not to receive. The discrimination is said to arise from the fact that the benefit being provided gives rise to a tax liability that is greater than the "true cost" of that benefit for some of the participants at certain points in time. (Overall, the benefit is a net benefit to the participants as a whole, and is likely a net benefit to each individual participant taking into account the impact of the benefit over their career as a whole, as opposed to just considering their younger years. See more on this point below.)
 - 6.2.1 On its face, it seems problematic to argue that the tax cost of all government benefit programs must be equal to or greater than the 'true cost' of the benefit, calculated on an actuarial basis, for all of the participants at all points in time. This proposition would have fairly wide implications, and could call into question the constitutionality of a wide variety of widely-used government benefit plans.
 - 6.2.2 As is explained in my April 18, 2000 letter, equality rights claims are inherently comparative in nature. That is, the claimant must establish that they are subject to differential treatment vis-a-vis some other comparable group, and then argue that this differential treatment is discriminatory. In this instance, the argument that *would* have to be made is that younger female participants in this benefit program do not receive the same benefit as older male participants. In effect, the argument would be that a government benefit program that fails to deliver the same level of taxable benefit to all age groups or to men and women equally is a violation of section 15.
 - 6.2.3 I know of no previous case in which this kind of argument has succeeded under section 15. As noted in paragraph 6.2 above, those claims that have successfully challenged government benefit programs under section 15 have been brought by persons who were excluded or denied the benefit in question. But courts have never held that all government benefit programs must deliver equal taxable benefits to all groups in society, for the obvious reason that such a requirement would render most government benefit programs unconstitutional.

- 6.3 What makes the argument here particularly novel is that the government is funding the benefit in question. The participant is not asked to pay anything directly. The discrimination is said to arise from the fact that the taxable benefit resulting from the provision of the benefit is greater than the 'true cost' of the benefit for some participants but not for others.
- 6.3.1 The proposition that the tax cost of all government benefits must be equal to or more than the 'true cost' of the benefit for all participants at all points in time requires a basis for calculating the 'true cost' of the benefit. Appendix 19 to the Government's December 20, 1999 submission includes a Worksheet B which seems to provide such a calculation, in a table entitled "Annual Gain (Loss) in the Compulsory Subsidized Plan". This calculation is based on comparing the "true annual cost of coverage" for a female judge appointed at age 40 with the judge's annual tax liability resulting from the conferring of a taxable benefit under the compulsory plan.
- 6.3.2 The column "true annual cost of coverage" represents the pure claims cost for \$356,200 of coverage using the mortality assumptions for the judicial population. However, based on my informal discussions with the actuarial experts, it seems that no individual judge could currently purchase insurance at these rates.
- 6.3.3 For example, the premiums that female judges currently pay for life insurance under the PSMIP are significantly higher than those set out in the column 'true annual cost of insurance' on Worksheet B. By my calculation (based on the premiums set out in Schedule A for Basic Life and Supplementary Life under the Main Plan in the PSMIP, which judges currently have the option of purchasing) a female judge at age 56 who wants to purchase \$356,200.00 of life insurance would currently pay a total of approximately \$1,217.00 annually (not \$784 as suggested on Worksheet B in Appendix 19), calculated as follows:
- a. \$662.16 annually for \$178,000.00 of Basic Life (one times salary) based on a premium of \$0.31 per month per \$1,000.00 of insurance; and
 - b. \$555.36 annually for \$178,000.00 of Supplementary Life (one times salary) based on a premium of \$0.26 per \$1,000.00 of salary. (Note that the premium for supplementary life is lower due to the medical requirement associated with this coverage.)
- 6.3.4 Thus it would seem that this 56 year old female judge would be better off under the Compulsory Subsidized Plan than she is now with the option of purchasing insurance under the PSMIP. She gets more insurance at a lower price. Her costs decrease by about \$100.00 annually, while she is no longer required to satisfy any medical requirement for the insurance. Moreover, the insurance under the Compulsory Subsidized Plan remains at \$356,200.00 until retirement, at which point it gradually reduces to 25 per cent of the benefit, where it remains constant until death. (This compares with the existing insurance package under the PSMIP which, as described above, begins decreasing at age 61 and

reduces to zero at retirement.) Of course, as she grows older, there is no increase in her taxable benefit under the Compulsory Subsidized Plan, whereas premiums increase with age under the PSMIP.

- 6.3.5 It is not clear to me why, for constitutional purposes, it is necessary or appropriate to calculate the 'true annual cost of coverage' in the manner set out in worksheet B, as opposed to on some other basis (such as on the basis of what the judge would pay today under the PSMIP.)
- 6.4 Yet regardless of how the 'true cost' of insurance is calculated, the fact remains that there will always be some significant cross-subsidization of older male judges by younger female judges. This is because such cross-subsidization is inherent in group life insurance plans.. Could this cross-subsidization not be said to constitute discrimination under section 15?
 - 6.4.1 The most obvious difficulty with the argument is that it focuses on the net gains or losses for an individual participant at one point in time only, namely, during their younger years. Yet when an individual decides whether to participate in a group life insurance plan (assuming for the moment such participation to be optional), they do not just take into account the net costs and benefits in the first year(s) of the plan. Taking a somewhat longer view, they will recognize that as they grow older, the value of the insurance will increase even though the taxable benefit will remain constant. Thus it is rational even for a very young person to elect to participate, if the net losses in the early years of their participation will be more than made up by net gains in their later years.
 - 6.4.2 The further difficulty with the argument is precisely that such cross-subsidization is an inherent feature of all group life insurance plans. As explained above, these plans generally provide for a flat premium per \$1,000 of life insurance for all members, with no variation by age or gender. Where the group life insurance is employer-paid, it gives rise to the same per-capita taxable benefit per \$1,000 of life insurance under the *ITA*. Therefore, to the extent that cross-subsidization of older males by younger females through employer-paid group insurance is to be prohibited under section 15, it may render invalid the group insurance arrangements for significant numbers of employers and employees, including all those public servants who are required to participate in the *PSSA*. Further, Regulation 2700 under the *ITA*, which expressly requires that gender and age differences be ignored in calculating the taxable benefit arising from employer-paid group life insurance, may well be unconstitutional.
 - 6.4.3 The section 15 argument would be made stronger if it could be shown that certain participants would suffer a 'net loss' through their participation in the group life insurance plan over their career as a whole. In other words, if it could be shown that the compulsory life insurance plan would make a participant worse off over their entire career (rather than simply in a particular year or years) such that the plan was not conferring a benefit at all but was imposing a net burden, then it would seem possible to argue that they were being subjected to 'differential treatment', as that term has been

defined in the context of section 15 claims under the *Charter*. However, no evidence has been provided to the Commission that would enable one to establish that this is or would be the case in respect of the proposed judicial group life insurance plan.

- 6.4.4 Note that in addition to the requirement of differential treatment, courts have held that there must be 'discrimination' before there is a violation of section 15. (See pages 8-9 of my April 18, 2000 letter on the interpretation of the term 'discrimination'.) Thus, even if it could be established that certain judicial participants were subjected to differential treatment, it would still be necessary to demonstrate that this treatment reflects the "stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration". (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paragraph 88.)
- 6.5 What of the possibility of making a group life insurance plan optional? Could it not be argued that the difficulty with the proposed plan is simply its compulsory nature, particularly when participation in the Executive Plan under the PSMIP is optional?
- 6.5.1 In my informal discussions with the actuarial experts, the compulsory nature of the proposed life insurance plan is explained on the basis of the particular demographics of the judiciary. Since there are a greater proportion of older males in the judiciary as compared to the general population, there is a concern that making the plan optional will dramatically increase the premiums and thus the taxable benefit for participants. In an optional plan these increases could have a cascading effect since, as premiums and taxable benefits rise, fewer appointees may find it attractive to participate, causing more participants to opt out, which in turn will cause premiums and taxable benefits to increase even further, until a point of equilibrium is eventually reached.²
- 6.5.2 In any event, it is common for participation in group life insurance plans to be compulsory. (See, for example, the SDB under the *PSSA* described earlier.) Thus it seems difficult to conclude that the compulsory nature of the proposed judicial plan in itself could form the basis for a finding that it is unconstitutional.
- 6.6 At bottom, what seems to give rise to the difficulty here is not the existence of cross-subsidization itself but, rather, the degree of such cross-subsidy. In order for this to form the basis for a constitutional argument (as opposed to an argument relating to the most

²If the plan were financed entirely by the members, the cascading effect would result in a rate spiral that would ultimately result in a membership consisting only of the very highest risks. The insurance principle would then be lost and the plan would cease to exist. However, since the plan would be effectively only 50% financed by members (i.e. the marginal tax rate), the rate spiral is halted at a certain point.

appropriate plan design) it would be necessary to find some principled basis for distinguishing the point at which cross-subsidization through group life insurance becomes unconstitutional. It is not clear to me that any such principled or judicially-manageable standard exists.

- 6.6.1 More fundamentally, the major difficulty with the constitutional argument is that it seems to be premised on the assumption that government benefit programs must provide equal taxable benefits to all groups who receive the benefit. As noted earlier, there is no legal authority recognizing such a constitutional requirement. Nor could such a requirement be recognized without significantly impacting the design of numerous government-funded benefit programs. It would also mean that the constitutional validity of various government programs would turn on actuarial calculations as to the 'true cost' of the programs, as compared with their tax cost. This seems an uncertain foundation upon which to base conclusions as to the validity of social benefit programs.

7.0 Conclusion

- 7.1 As noted, this memorandum sets out my preliminary observations with respect to the *Charter* section 15 implications of the matter raised. I would be happy to undertake a more detailed analysis of this issue should you or the other Commissioners regard that as appropriate.

